FILED

(1) 021188 DEC 13 2002

No..... OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

E.K. McDANIEL, Warden, Ely State Prison; JACKIE CRAWFORD, Director, Nevada Department of Prisons; BRIAN SANDOVAL, Attorney General of the State of Nevada,

Petitioners,

v.

JOHN ESPIREDION VALERIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIAN SANDOVAL
Attorney General of the State of Nevada

GERALD GARDNER*
Chief Deputy Attorney General
Criminal Justice Division
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Telephone: (702) 486-3396

Counsel for Petitioners
*Attorney of Record

213 pp

QUESTIONS PRESENTED

1. WHETHER THE NINTH CIRCUIT DISREGARDED THE NEVADA SUPREME COURT'S INTERPRETATION AND EXPLANATION OF NEVADA'S PROCEDURAL DEFAULT LAW IN *PELLEGRINI V. STATE*, 34 P.2d 519 (NEV. 2001), AND ERRONEOUSLY DETERMINED THAT THE STATE PROCEDURAL BAR, NRS 34.810, IS INADEQUATE?

2A. WHETHER THE NINTH CIRCUIT ERRONEOUSLY FAILED TO PLACE THE BURDEN ON VALERIO OF PROVING THE INADEQUACY OF THE PROCEDURAL BAR APPLIED IN HIS CASE?

B. WHETHER THE NINTH CIRCUIT'S DETERMINATION OF WHETHER OR NOT THE APPLICATION OF NRS 34.810 IS ADEQUATE IS CONTRARY TO AND IN DISREGARD OF *DUGGER v. ADAMS*, 489 U.S. 401, 445 (1989);

HARRIS v. REED, 489 U.S. 255, 262-64 (1989); AND *JOHNSON v. MISSISSIPPI*, 486 U.S. 578, 587 (1988)?

3A. WHETHER THE NINTH CIRCUIT'S RESURRECTION OF UNEXHAUSTED CLAIMS VIOLATES THE PROHIBITION ESTABLISHED BY *ROSE v. LUNDY*, 455 U.S. 509 (1982), AGAINST CONSIDERING THE MERITS OF A CLAIM IN A MIXED PETITION FOR WRIT OF HABEAS CORPUS?

B. ADDITIONALLY, WHETHER THE NINTH CIRCUIT'S GRANT OF FEDERAL HABEAS RELIEF ON A SENTENCING CLAIMS BEFORE RESOLUTION OF GUILT-PHASE ISSUES VIOLATES THE ARTICLE III, SECTION 2, PROHIBITION AGAINST ADVISORY OPINIONS?

4. EVEN IF THE COURT OF APPEALS PROPERLY REACHED AND DECIDED THE SENTENCING CLAIMS BEFORE THE GUILT-PHASE CLAIMS,

WHETHER THE NINTH CIRCUIT ERRED BY GRANTING FEDERAL HABEAS RELIEF ON GROUNDS 14 AND 15?

TOPICAL INDEX

OPINIONS AND JUDGMENTS BELOW 2

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

I. THE NINTH CIRCUIT DISREGARDED THE NEVADA SUPREME COURT'S INTERPRETATION AND EXPLANATION OF NEVADA'S PROCEDURAL DEFAULT LAW IN *PELLEGRINI v. STATE*, 34 P.2d 519 (NEV. 2001), STATE PROCEDURAL BAR, NRS 34.810, IS INADEQUATE 9

IIA. THE NINTH CIRCUIT ERRONEOUSLY DID NOT PLACE THE BURDEN ON VALERIO OF PROVING THE INADEQUACY OF THE PROCEDURAL BAR APPLIED IN HIS CASE. 14

B. ADDITIONALLY, THE NINTH CIRCUIT'S DETERMINATION OF WHETHER OR NOT THE APPLICATION OF NRS 34.810 IS ADEQUATE IS CONTRARY TO AND IN DISREGARD OF *DUGGER v. ADAMS*, 489 U.S. 404, 445 (1989); *HARRIS v. REED*, 489 U.S. 401, 445 (1989); AND *JOHNSON v. MISSISSIPPI*, 486 U.S. 578, 587 (1988) 14

TOPICAL INDEX CONT.

IIIA. THE NINTH CIRCUIT'S RESURRECTION OF UNEXHAUSTED CLAIMS VIOLATES THE PROHIBITION ESTABLISHED BY *ROSE v. LUNDY*, 455 U.S. 509 (1982), AGAINST CONSIDERING THE MERITS OF A CLAIM IN A MIXED PETITION FOR WRIT OF HABEAS CORPUS 19

B. ADDITIONALLY, THE NINTH CIRCUIT'S GRANT OF FEDERAL HABEAS RELIEF ON A SENTENCING CLAIMS BEFORE RESOLUTION OF GUILT PHASE ISSUES VIOLATES THE ARTICLE III, SECTION 2, PROHIBITION AGAINST ADVISORY OPINIONS..... 19

IV. EVEN F THE COURT OF APPEALS PROPERLY REACHED AND DECIDED THE SENTENCING CLAIMS BEFORE THE GUILT PHASE CLAIMS, THE NINTH CIRCUIT ERRED BY GRANTING FEDERAL HABEAS RELIEF ON GROUNDS 14 AND 15..... 22

CONCLUSION..... 30

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C..... C-1

APPENDIX D..... D-1

TOPICAL INDEX CONT.

APPENDIX E E-1

APPENDIX F F-1

APPENDIX G G-1

APPENDIX H H-1

APPENDIX I I-1

APPENDIX J J-1

APPENDIX K K-1

APPENDIX L L-1

APPENDIX M M-1

APPENDIX N N-1

APPENDIX O O-1

APPENDIX P P-1

TABLE OF AUTHORITIES

Cases

Allied Chemical Corp. v. Hess Tankship Co., 661 F.2d 1044 (5th Cir. 1981) 19

Bargas v. Burns, 179 F.3d 1207 (9th Cir. 1999) 7

Bell v. Cone, 535 U.S. 685 (2002) 25

Bennett v. Mueller, 296 F.3d 752 (9th Cir. 2002) 14

Calderon v. District Ct. (Bean), 96 F.3d 1126 (9th Cir. 1996) 7

Canape v. State, 859 P.2d 1023 (Nev. 1993) 27

Clemons v. Mississippi, 494 U.S. 738 (1990) 25, 28

Coleman v. Thompson, 501 U.S. 722 (1991) 13

Dugger v. Adams, 489 U.S. 401 (1989) 14, 16, 19

Emery v. Johnson, 139 F.3d 191 (5th Cir. 1998) 15

Estelle v. McGuire, 502 U.S. 62 (1991) 12, 17

Flanagan v. State, 754 P.2d 836 (Nev. 1988) 10

Flast v. Cohen, 392 U.S. 83 (1968) 21

Godfrey v. Georgia, 446 U.S. 420 (1986) 28

Harris v. Reed, 489 U.S. 255 (1989) 14, 16

Hartman v. Sumners, 120 F.3d 157 (9th Cir. 1997) 13, 17

Hicks v. Feiock, 485 U.S. 624 (1988) 12

Hill v. State, 953 P.2d 1077 (Nev. 1998) 10, 11

TABLE OF AUTHORITIES CONT.

Hooks v. Ward, 184 F.3d 1206 (10th Cir. 1999) 14

Johnson v. Mississippi, 486 U.S. 578 (1988) 14, 16

Kirshner v. Uniden Corporation of America, 842 F.2d 1074 (9th Cir. 1988) 17

Lambrix v. Singletary, 520 U.S. 518 (1997) 13

Lewis v. Jeffers, 497 U.S 764 (1990) 17, 25, 27

Lindh v. Murphy, 521 U.S. 320 (1997) 24

Maynard v. Cartwright, 486 U.S. 356 (1998) 25

McKenna v. McDaniel, 65 F.3d 1483 (9th Cir. 1995) 7

Mills v. Green, 159 U.S. 651 (1895) 21

Moran v. McDaniel, 80 F.3d 1261 (9th Cir. 1996) 7

Moran v. State, 734 P.2d 712 (Nev. 1987) 27

Paradis v. Arave, 954 F.2d 1483 (9th Cir. 1992) vacated on other grounds, 507 U.S. 1026 (1993) 14

Parker v. Dugger, 498 U.S. 308 (1991) 24

Pellegrini v. State, 34 P.2d 519 (Nev. 2001) 9, 10, 11, 18

Pertgen v. State, 875 P.2d 361 (Nev. 1994) 10, 11

Petrocelli v. Angelone, 248 F.3d 887 (9th Cir. 2001) 7

Prihoda v. McCaughry, 910 F.2d 1379 (7th Cir. 1990) 15

Pulley v. Harris, 456 U.S. 37 (1984) 17

TABLE OF AUTHORITIES CONT.

Reno v. Koray, 515 U.S. 50 (1995)..... 22

Richmond v. Lewis, 506 U.S. 40 (1992)..... 29

Robins v. State, 798 P.2d 558 (Nev. 1990)..... 27

Rose v. Lundy, 455 U.S. 509 (1982) 19, 21

Slack v. McDaniel, 529 U.S. 473 (2000)..... 20

Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994)..... 15

Spencer v. Kemna, 523 U.S. 1 (1998)..... 21

Steffel v. Thompson, 415 U.S. 452 (1974)..... 21

Stringer v. Black, 503 U.S. 222 (1992) 28

Teague v. Lane, 489 U.S. 288 (1989) 29

United States v. Duarte, 1 F.3d 644 (7th Cir. 1993) 19

United States v. Fruehauf, 365 U.S. 146 (1961)..... 21

Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002) (*en banc*)..... 4, 8, 9, 10, 15, 17, 20, 22, 23

Valerio v. State, 915 P.2d 874 (Nev. 1996) 4, 5, 12, 18

Walton v. Arizona, 497 U.S. 639 (1990) 24

Williams v. Taylor, 529 U.S. 362 (2000)..... 25

Zichko v. Idaho, 247 F.3d 1015 (9th Cir. 2001)..... 15

Statutes

28 U.S.C. § 1254(1)..... 3

TABLE OF AUTHORITIES CONT.

28 U.S.C. § 2254 ..... 2, 3, 5

28 U.S.C. § 2254(d) 24, 25, 29

NRS 34.810 ..... 4, 5, 6, 9, 11, 14, 17, 18, 19

NRS 34.810(2) 12

NRS Chapter 177 ..... 11, 18

NRS Chapter 34 ..... 4, 5, 11, 12

Other Authorities

Fed.R.App.P. 10(a) 3

Sup. Ct. R. 13 3

Rules

Ninth Cir. Rule 10-2 3

Constitutional Provisions

United States Constitution, Article III, § 2 ..... 3, 21

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

E. K. McDANIEL, Warden, Ely State Prison;
JACKIE CRAWFORD, Director, Nevada Department of Prisons; BRIAN SANDOVAL, Attorney General of the State of Nevada,
Petitioners,

v.

JOHN ESPIREDION VALERIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioners above-named (the State) file this petition for writ of certiorari seeking an order vacating the September 17, 2002, Order of the United States Court of Appeals for the Ninth Circuit, whereby Valerio's death sentence was vacated.

OPINIONS AND JUDGMENTS BELOW

State v. Valerio, Case No. C77268, Eighth Judicial District Court of the State of Nevada in and for the County of Clark, filed January 28, 1988.

Valerio v. State, 810 P.2d 344 (Nev. 1989) (unpublished).

Valerio v. State, 872 P.2d 836 (Nev. 1992) (unpublished).

Valerio v. State, 915 P.2d 874 (Nev. 1996) (Valerio I)

Valerio v. Bayer, et al., Memorandum Decision and Order, Case No. CV-N-96-HDM(RAM), United States District Court, District of Nevada, filed August 19, 1998.

Valerio v. Bayer, et al., Judgment in a Civil Case, Case No. CV-N-96-HDM(RAM), United States District Court, District of Nevada, filed August 20, 1998.

Valerio v. Bayer, et al., Memorandum, Case No. 98-99033, United States Court of Appeals for the Ninth Circuit, filed April 19, 2000. (vacated).

Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002) (Valerio II)

JURISDICTIONAL STATEMENT

The federal district court denied Valerio's federal habeas corpus petition. See 28 U.S.C. § 2254. A three-

judge panel of the Ninth Circuit Court of Appeals affirmed the denial of the petition. The Ninth Circuit granted Valerio's request for rehearing and suggestion for rehearing *en banc,* then reversed and remanded with instructions. *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002)(*en banc*). The State now seeks a petition for writ of certiorari to the Ninth Circuit Court of Appeals. The Ninth Circuit filed its opinion on September 17, 2002. The State filed its petition for writ of certiorari within ninety (90) days after entry of judgment by the court of appeals below. Sup. Ct. R. 13. The State invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, § 2

28 U.S.C. § 2254

Fed.R.App.P. 10(a)

Ninth Cir. Rule 10-2

Ninth Cir. Rule 22-1

NRS Chapter 177 (repealed)

NRS Chapter 34

NRS 34.810

STATEMENT OF THE CASE

In a 7-4 decision, an *en banc* panel of the Ninth Circuit reversed the district court's dismissal of several of Valerio's claims as an abuse of the writ; reversed the dismissal of other claims as procedurally barred; granted habeas relief with respect to two penalty-phase claims, and remanded the matter with instructions. *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002) (*en banc*) (Valerio II). In so doing, the Ninth Circuit committed numerous egregious errors.

In 1988, a jury convicted Valerio of first degree murder with the use of a deadly weapon and sentenced him to death. *Valerio v. State*, 915 P.2d 874, 875 (Nev. 1996) (Valerio I).

On direct appeal, the Nevada Supreme Court affirmed both the conviction and the sentence. *Valerio I* at 875.

Valerio then filed a petition for state post-conviction relief. The state district court denied his petition after concluding that it lacked merit. The Nevada Supreme Court dismissed his appeal. *Valerio I*, 915 P.2d at 875; *Valerio II*, 306 F.3d at 749.

Valerio filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, which was dismissed without prejudice because it was unexhausted. *Valerio I*, 915 P.2d at 875; *Valerio II*, 306 F.3d at 749.

Next, Valerio filed a state petition for writ of habeas corpus (post-conviction) pursuant to NRS Chapter 34. In his petition, Valerio raised 24 claims. The State moved to dismiss the petition. Valerio never responded. The state district court dismissed all of Valerio's claims as procedurally barred pursuant to NRS 34.810. Valerio appealed from the dismissal of the petition. *Valerio I*, 915 P.2d at 875. The Nevada Supreme Court affirmed. *Id.* at 878.

Valerio filed his current petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Valerio II*, 306 F.3d at

749. The State moved to dismiss the petition arguing several grounds were either an abuse of the writ or procedurally barred pursuant to NRS 34.810. Appendix B-1. The federal district court found that the inclusion of three new and unexhausted claims constituted an abuse of the writ and dismissed those claims pursuant to then Ninth Circuit precedent. Appendix B-4-5. After being given time to show cause and prejudice to overcome the procedural default, Valerio did not do so. Appendix B-5, C-1-6, D-1-2. The federal district court addressed the remaining claims and concluded those claims were without merit and denied Valerio's petition. Appendix E-1-25. *Valerio II*, 306 F.3d at 749.

Valerio appealed. The federal district court granted Valerio a certificate of appealability with respect to Grounds 13, 14 and 15.[1] Appendix G-1-2. The three-judge panel affirmed the federal district court's ruling on claims 14 and 15 and did not consider the other issues Valerio

---

[1] Valerio abandoned Ground 13 on appeal.

had sought to appeal. Appendix H-1-16. *Valerio II*, 306 F.3d at 749.

Valerio sought rehearing and rehearing en banc. The Ninth Circuit granted Valerio's request for rehearing and rehearing *en banc*, vacating the panel's decision. *Valerio*, 306 F.3d at 749-50. Appendix I-1.

The Ninth Circuit subsequently requested supplemental briefing with respect to two issues: 1) "Does the Nevada Supreme Court's finding of procedural default for the majority of Valerio's claims rely on 'independent and adequate state grounds,' in light of *Calderon v. District Ct. (Bean)*, 96 F.3d 1126, 1131 (9th Cir. 1996)?" and 2) Does the Nevada Supreme Court's finding of procedural default constitute an "independent and adequate state ground" given the Ninth Circuit's holdings in *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995); *Moran v. McDaniel*, 80 F.3d 1261 (9th Cir. 1996); *Bargas v. Burns*, 179 F.3d 1207 (9th Cir. 1999); *see also Petrocelli v. Angelone*, 248 F.3d 887 (9th Cir. 2001)?" Appendix J-1-2. The parties submitted their briefs.

Valerio filed a request for the Ninth Circuit to take judicial notice of various extra-judicial materials, unpublished decisions, orders and other items, which the Ninth Circuit denied. Appendix L-1-4. Appendix K-1. However, after oral argument, the Ninth Circuit withdrew its order, granted Valerio's request to take judicial notice and invited the parties to submit supplemental briefing addressing the legal significance of those materials. Appendix M-1-2. The Ninth Circuit then took judicial notice of Valerio's supplemental materials and denied the State's motion to strike. Appendix N-1 and O-1. The parties submitted their supplemental briefs.

After additional oral argument, the Ninth Circuit reversed the federal district court's decision and remanded the matter with instructions. *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002) (*en banc*).

REASONS FOR GRANTING THE WRIT

Compelling reasons exist for this Court to grant this petition for certiorari. The United States Court of Appeals for the Ninth Circuit has entered a decision in

this case that conflicts with decisions of this Court and with the Nevada Supreme Court, a state court of last resort. Additionally, the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Rule 10, Rules of the Supreme Court of the United States. These reasons are explained below.

I. THE NINTH CIRCUIT DISREGARDED THE NEVADA SUPREME COURT'S INTERPRETATION AND EXPLANATION OF NEVADA'S PROCEDURAL DEFAULT LAW IN *PELLEGRINI V. STATE*, 34 P.2d 519 (NEV. 2001)[2], AND ERRONEOUSLY DETERMINED THAT THE STATE PROCEDURAL BAR, NRS 34.810, IS INADEQUATE.

In its decision, the Ninth Circuit held,

> Based on the foregoing, we hold that in 1990 there was no 'clear, consistently applied, and well-established' rule in capital cases that prevented the Nevada Supreme Court from addressing constitutional claims on the ground that those claims had not been presented in earlier proceedings. The

---

[2] The Ninth Circuit was obviously aware of the decision because it is cited in *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002). Furthermore, the court was provided a copy of the decision in the State's Supplemental Brief pursuant to the Ninth Circuit's request that the parties address the "legal significance" of the cases that Valerio offered for the first time on appeal.

> number and variety of cases in which the Nevada Supreme Court addressed constitutional claims on the merits in capital cases, despite unexcused failures to present those claims in earlier proceedings, lead us to conclude that the court exercised a general discretionary power to address them.

Valerio v. Crawford, 306 F.3d 742, 778 (9th Cir. 2002) (Valerio II). The Ninth Circuit then concluded that the procedural bar NRS 34.810 was not adequate. This holding is erroneous in its conclusion and defective in its reasoning. As shown below, the opinion relies on inapposite citations,[3] ignores pertinent authorities, applies an inappropriate test and overrides or ignores precedent set by this Court.

The Ninth Circuit ignored a Nevada Supreme Court decision on procedural default decided while *Valerio II* was pending. *Pellegrini v. State*, 34 P.3d 519 (Nev. 2001).[4] In *Pellegrini*, the Nevada Supreme Court

---

[3] *Hill v. State*, 953 P.2d 1077 (Nev. 1998); *Pertgen v. State*, 875 P.2d 361 (Nev. 1994); *Flanagan v. State*, 754 P.2d 836 (Nev. 1988); and *Jones v. State*, 707 P.2d 1128 (Nev. 1985).

[4] *Valerio II* did cite *Pellegrini* but without attaching any significance to the decision other than for how that case addressed other issues. *Valerio II*, 306 F.3d at 749, 758, 768, 777.

expressly addressed what it perceived as a misinterpretation of Nevada procedural default law by the Ninth Circuit. *Id.* at 532-36. However, *Pellegrini* is not cited by the Ninth Circuit on this issue.

In *Pellegrini*, the Nevada Supreme Court rejected the Ninth Circuit's interpretation and held that neither *Jones* nor *Flanagan* created a procedural bar exception in any habeas corpus proceeding, capital or not. *Pellegrini*, 34 P.2d at 535. *Jones* and *Flanagan* both involve direct appeals and do not involve an action brought pursuant to NRS Chapter 34 or the applicability of NRS 34.810. *Id.*

The Nevada Supreme Court expressly rejected the Ninth Circuit's interpretation of both *Hill v. State*, 953 P.2d 1077 (Nev. 1998), *Pertgen v. State*, 875 P.2d 361 (Nev. 1994), and *Pellegrini*, 34 P.3d at 535-536.

The Ninth Circuit's reference to what happened in "Valerio's own case" is wholly misleading. It is a reference to Valerio's earlier post-conviction action brought pursuant to NRS Chapter 177 and not the state post-conviction action in which the procedural bar was

applied. *Valerio II*, 306 F.3d at 777. Thus, the Ninth Circuit's reference is irrelevant.

The Ninth Circuit also relied upon a portion of a dissenting opinion taken from *Valerio I*, 915 P.2d 874, 878 (Nev. 1996). *Valerio II*, 306 F.3d at 777-78. The Ninth Circuit's reliance on the dissenting opinion is utterly misplaced because it is not the opinion of the majority. *Valerio I*, 915 P.2d at 878; *Pellegrini*, 34 P.2d at 535. In *Valerio I*, the majority of the Nevada Supreme Court applied NRS 34.810(2) and on that basis affirmed the dismissal of claims Valerio had presented in a petition brought pursuant to NRS Chapter 34. If anything, the Nevada Supreme Court's decision in *Valerio I* is evidence of the consistent application of the procedural bar.

This Court has held that the highest state court is the arbiter of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Hicks v. Feiock*, 485 U.S. 624, 629-30 (1988). Even the Ninth Circuit has held that a state court ruling on issues of state law should be accepted by the federal courts. *Hartman v. Sumners*, 120 F.3d 157, 161 (9th Cir.

1997). The principles of comity and federalism suggest that state procedural default laws are subject to the same deference by federal courts as other state laws. After all, an applicable procedural default bars consideration of Constitutional claims of all kinds and should be considered by the federal courts before other issues. *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997). As *Lambrix* went on to hold, "A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Id.* at 525.

This Court has held that a federal court must apply the applicable state procedural bars if a return to state court is impossible to exhaust a claim. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). *Coleman* and *Lambrix* make absolutely no sense if federal courts are allowed to ignore how state appellate courts have interpreted those procedural default laws and rules.

IIA. THE NINTH CIRCUIT ERRONEOUSLY DID NOT PLACE THE BURDEN ON VALERIO OF PROVING THE INADEQUECY OF THE PROCEDURAL BAR APPLIED IN HIS CASE.

B. ADDITIONALLY, THE NINTH CIRCUIT'S DETERMINATION OF WHETHER OR NOT THE APPLICATION OF NRS 34.810 IS ADEQUATE IS CONTRARY TO AND IN DISREGARD OF *DUGGER v. ADAMS*, 489 U.S. 401, 445 (1989); *HARRIS v. REED*, 489 U.S. 255, 262-64 (1989); AND *JOHNSON v. MISSISSIPPI*, 486 U.S. 578, 587 (1988).

This case presents this Court with the opportunity to resolve a split of authority regarding which party in a federal habeas action has the burden of proof with respect to regular or irregular application of procedural bars. *See Dugger v. Adams*, 489 U.S. 401, 410, n.6 (1989) (petitioner's citation to a few state cases ignoring bar insufficient to show inadequacy); *Bennett v. Mueller*, 296 F.3d 752, 761-763 (9th Cir. 2002); (respondent's burden to show regular application); *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999) (petitioner has initial burden); *Paradis v. Arave*, 954 F.2d 1483, 1493 (9th Cir. 1992), *vacated on other grounds*, 507 U.S. 1026 (1993) (petitioner failed to demonstrate irregular

application); *Zichko v. Idaho*, 247 F.3d 1015, 1021 (9th Cir. 2001) (petitioner has not argued inadequacy); *Smith v. Dixon*, 14 F.3d 956, 972 (4th Cir. 1994) (en banc) (petitioner failed to show procedural bar not consistently applied); *Prihoda v. McCaughry*, 910 F.2d 1379, 1383-1384 (7th Cir. 1990) (same); *Emery v. Johnson*, 139 F.3d 191, 201 (5th Cir. 1998) (same).

Resolving this split in authority will aid in the efficient administration of procedurally defaulted claims by placing the burden with the party claiming that a procedural default is inadequate.

In this case the Ninth Circuit found "in 1990 there was no 'clear, consistently applied, and well-established' rule in capital cases that prevented the Nevada Supreme Court from addressing constitutional claims on the ground that those claims had not been presented in earlier proceedings." *Valerio v. Crawford*, 306 F.3d 772, 778 (9th Cir. 2002) (*Valerio II*).[5] The Ninth Circuit's determination and methodology was erroneous for many reasons.

---

[5] This is an incorrect statement of law and fact because NRS 34.810 was

The Ninth Circuit failed to assign to either party the burden of proof with respect to regular or irregular application of procedural bars and, in a one-sided evidentiary free-for-all, took judicial notice of Valerio's offerings. Appendix L, M, N, and O.

Second, the Ninth Circuit did not address the proper question. This Court has held that the proper test is whether the procedural bar actually applied is strictly or regularly applied evenhandedly to the vast majority of similar claims. *Dugger v. Adams*, 489 U.S. 401, 445 (1989); *Harris v. Reed*, 489 U.S. 255, 262-64 (1989); and *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). Instead of using this test, the Ninth Circuit addressed the question whether or not Nevada's procedural bars are consistently applied in death cases.

Third, the panel did not afford the state procedural bar the Nevada Supreme Court clearly and expressly relied upon the presumption of adequacy to which it was

---

enacted in 1985. See 1985, Statutes of Nev. 1232.

entitled pursuant to *Dugger, Harris,* and *Johnson. Valerio II,* 306 F.3d at 776-79.

Fourth, when the matter was before the *en banc* panel of the Ninth Circuit, the Ninth Circuit considered "evidence" purporting to show the inadequacy of the state procedural bar which was not part of the record on appeal and which had not been presented either to the federal district court or to the three-judge panel. Appendix L, M, N and O. Fed.R.App.P. 10(a). Ninth Cir. Rule 10-2. *Kirshner v. Uniden Corporation of America,* 842 F.2d 1074, 1077 (9th Cir. 1988) (issue may not be raised for first time on appeal).

Fifth, the Ninth Circuit, contrary to this Court's and its own precedent, ignored the Nevada Supreme Court's interpretation of Nevada's laws and the Nevada Supreme Court's statement that the procedural bar, NRS 34.810, was and is consistently applied. *Estelle v. McGuire,* 502 U.S. 62, 68 (1991); *Lewis v Jeffers,* 497 U.S. 764, 780 (1990); *Pulley v. Harris,* 456 U.S. 37, 41 (1984); *Hartmann v. Summers,* 120 F.3d 157, 161 (9th Cir. 1997). The Ninth Circuit also

ignored controlling Nevada cases. *Valerio I*, 915 P.2d at 878. *See Pellegrini v. State*, 34 P.3d 519, 532-38 (2001) (citing cases).

Sixth, in determining that NRS 34.810 was inadequate as a procedural bar, the Ninth Circuit failed to examine whether it was strictly or regularly applied to the vast majority of similar claims. Instead, the Ninth Circuit based its determination on various inapposite Nevada Supreme Court decisions; its interpretation of what happened in Valerio's NRS 177 action; and a recitation of a portion of a dissenting opinion. *Valerio II*, 306 F.3d at 776-78. While the Ninth Circuit noted the distinction between two Nevada post-conviction statutes, it thereafter ignored the distinction when it relied on the inapposite cases and "what happened in Valerio's own case." *Valerio II*, 306 F.3d at 749 n.1.

Seventh, late in the appellate process the Ninth Circuit embarked on a fact-finding mission and made a factual finding, i.e., that Nevada's procedural bars are not consistently applied in death cases, that it lacked

jurisdiction to make. *See United States v. Duarte*, 1 F.3d 644, 649 (7th Cir. 1993) (appellate courts do not engage in factfinding); *Allied Chemical Corp. v. Hess Tankship Co.*, 661 F.2d 1044, 1050 n.12 (5th Cir. 1981) (same). Even if the Ninth Circuit could have made such a factual finding, it failed to make the factual finding necessary to support its judgment that NRS 34.810 is not strictly or regularly applied evenhandedly to the vast majority of similar claims. *See Dugger v. Adams*, 489 U.S. 401, 410 (1989) (petitioner's citation to a few state cases ignoring bar insufficient to show inadequacy).

In sum, the Ninth Circuit, without factual, legal, logical or rational basis, abrogated the application of NRS 34.810 to bar consideration of Valerio's claims.

IIIA. THE NINTH CIRCUIT'S RESURRECTION OF UNEXHAUSTED CLAIMS VIOLATES THE PROHIBITION ESTABLISHED BY *ROSE v. LUNDY*, 455 U.S. 509 (1982), AGAINST CONSIDERING THE MERITS OF A CLAIM IN A MIXED PETITION FOR WRIT OF HABEAS CORPUS.

B. ADDITIONALLY, THE NINTH CIRCUIT'S GRANT OF FEDERAL HABEAS RELIEF ON A SENTENCING CLAIMS BEFORE RESOLUTION OF GUILT PHASE ISSUES

VIOLATES THE ARTICLE III, SECTION 2, PROHIBITION AGAINST ADVISORY OPINIONS.

The federal district court dismissed three claims as an abuse of the writ but also found them to be unexhausted. Appendix B-4-5. The Ninth Circuit, relying on *Slack v. McDaniel*, 529 U.S. 473 (2000), reversed the dismissal of those three unexhausted claims as an abuse of the writ. The reinstatement of those unexhausted claims renders Valerio's petition a mixed petition – a fact which the Ninth Circuit concedes. *Valerio II*, 306 F.3d at 750 n.3. Moreover, the federal district court found that the claims identified as "additional allegation added to 16(h), new ground 17(m), and new ground 25" "were not presented to the state court during the second state post conviction proceeding and are thus unexhausted grounds." Appendix B-4.

Nevertheless, the Ninth Circuit reached and decided a penalty-phase claim and reversed the federal district court's denial of that claim. The Ninth Circuit thus reviewed a mixed petition on the merits contrary to *Rose v.*

Lundy, 455 U.S. 509, 522 (1982). The Ninth Circuit cherry-picked a single penalty-phase issue and went on to unnecessarily decide it on the merits

If Valerio were to prevail on any of his guilt claims, then it would be unnecessary to reach any sentencing claim. In this case, the Ninth Circuit's decision violates the prohibition against advisory opinions. United States Constitution, Article III, Section 2. *Flast v. Cohen*, 392 U.S. 83, 94-97 (1968); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). The mere fact that the Ninth Circuit has resolved the sentencing claim before the guilt-phase claims makes the decision an advisory opinion because if Valerio were to prevail on any of his guilt-phase claims, it would be unnecessary to resolve any of the sentencing claims. Indeed, the question resolved by the Ninth Circuit would be moot. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Steffel v. Thompson*, 415 U.S. 452, 459 n 10 (1974); *Mills v. Green*, 159 U.S. 651, 653 (1895). The Ninth Circuit's hope that upon remand the petition will become un-mixed does not change the fact that it is presently mixed or the fact that

the claim may remain mixed. The hope does not negate the menace to the States affected by the decision.

Within the context of federal habeas corpus litigation, it is difficult to imagine anything more harmful to the principles of comity and federalism than to have the States have to respond to and/or consider an advisory federal court decision in a collateral attack on an issue that did not have to be decided. The violation is even more egregious in this instance because the parties never developed the issue in the fashion the way the court of appeals framed it and decided it. *Valerio II*, 306 F.3d at 782. To the extent that any such issue was raised, it was raised by *amicus curiae*. Such issue was not properly before the court. *Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995).

IV. EVEN IF THE COURT OF APPEALS PROPERLY REACHED AND DECIDED THE SENTENCING CLAIMS BEFORE THE GUILT-PHASE CLAIMS, THE NINTH CIRCUIT ERRED BY GRANTING FEDERAL HABEAS RELIEF ON GROUNDS 14 AND 15.

Valerio appealed the state district court's denial of his post-conviction petition to the Nevada Supreme Court.

With respect to Valerio's claim that the depravity of mind instruction was unconstitutional, the Nevada Supreme Court wrote:

> [Valerio] contends that the jury was improperly instructed. We agree with the district court that the murder of Karen Blackwell involved torture (or serious physical abuse). In *Robins v. State*, 106 Nev. 611, 629, 798 P.2d 558, 570 (1990), we recognized that a depravity of mind instruction must include "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to [the] aggravating circumstance."
>
> In this case, evidence that Ms. Blackwell was stabbed more than forty-five times, had "defensive wounds" on her hands and arms, and died not from one wound but from all the wounds combined, satisfies us that she was subjected to torture and/or serious physical abuse before she died. As in *Robins*, we thus conclude that the depravity of mind instruction in Mr. Valerio's case was not unconstitutionally vague as applied.

Valerio v. Crawford(Valerio II), 306 F.3d 742, 755 (9th Cir. 2002).

Although the federal district court denied habeas relief on Grounds 14 and 15,[6] the court granted a certificate of appealability with respect to the grounds. Appendix G-1-2.

The Ninth Circuit reversed the district court's denial of habeas relief with respect to the grounds. However, the reasons offered by the Ninth Circuit for reversing the denial of relief are inconsistent with the presumption that state courts know and follow the law. *See, e.g., Parker v. Dugger*, 498 U.S. 308, 314-316 (1991); *Walton v. Arizona*, 497 U.S. 639, 653 (1990). The reasons are also incompatible with 28 U.S.C. § 2254(d)'s "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997), which demands that state court decisions be given the benefit of the doubt. Moreover, they are inconsistent with 28 U.S.C. § 2254(d)'s "unreasonable application" clause. Simply put, the Nevada Supreme Court's decision was not objectively unreasonable. See *Bell v. Cone*, 535 U.S. 685,

---

[6] Grounds 14 and 15 as they appeared in Valerio's federal habeas

___ (2002) (slip op., at 12); *Williams v. Taylor*, 529 U.S. 362, 411 (2000). An "*unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, 529 U.S. at 410; *Bell*, (slip op., at 7). The Ninth Circuit did not observe this distinction, but ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d).

The Ninth Circuit's holding that a state appellate court lacks authority to cure an unconstitutional instruction by a narrowing construction whenever the sentence is determined by a jury is simply wrong. *Clemons v. Mississippi*, 494 U.S. 738 (1990), says that an appellate court has the authority and nothing said in *Walton* is to the contrary.

Valerio did not argue that *Walton* appellate fact-finding is unavailable when the penalty-phase factfinder was a jury. Valerio acknowledges that under *Walton*, *Lewis v. Jeffers*, 497 U.S. 764 (1990), and *Maynard v. Cartwright*, 486 U.S. 356 (1998), a vague aggravating

---

petition appear in Appendix A-1, 2.

circumstance may survive a constitutional challenge where a sufficiently narrow construction is adopted and applied by a state appellate court. Valerio argued that the state courts did not cure the unconstitutional impact of the vague aggravator in his case because there was insufficient evidence of torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself to avoid the unconstitutional application of the vague aggravator. He further argued that the Nevada Supreme Court and the federal district court failed to apply the narrowing construction to the aggravator such that it remains unconstitutionally vague. He also argued that the Nevada Supreme Court has inconsistently applied its limiting construction. Finally, he argued that the state supreme court lacked authority under state law to make the findings necessary to uphold the sentence of death or the aggravating circumstance upon which it is based.

These arguments are easily repelled. Given the evidence of how and where Valerio stabbed the victim, a rational factfinder could have found that she was

subjected to torture and/or serious physical abuse. *Valerio*, 306 F.3d at 789. Valerio's argument that the repeated blows show panic or frenzy lacks any support in the record. Whether the Nevada Supreme Court failed to apply the *Robins* limiting construction correctly is a matter of state law for which federal habeas corpus does not lie. *Lewis v. Jeffers*, 497 U.S 764, 780 (1990). Likewise, the Nevada Supreme Court has held that it has the authority under state law to reweigh under *Clemons*. *Canape v. State*, 859 P.2d 1023, 1034 (Nev. 1993). It follows that it does not lack authority to conduct a harmless error review. That is what is has done in other cases. *See, e.g., Robins v. State*, 798 P.2d 558, 564 (Nev. 1993); *Moran v. State*, 734 P.2d 712, 714-15 (Nev. 1987). That is what the Nevada Supreme Court did in determining that the evidence supports the existence of the aggravating circumstance as properly defined.

The Ninth Circuit's conclusion that *Walton* does not extend to jury determinations cannot stand because that conclusion necessarily depends on the premise that

Walton permits *de novo* "appellate factfinding." However, harmless error analysis is not *de novo* fact-finding. Rather, a state appellate court's affirming the death sentence after the jury has been instructed to consider an invalid factor simply determines that the result would have been the same had the aggravating circumstance been properly defined. *Stringer v. Black*, 503 U.S. 222, 230 (1992); *Clemons*; 494 U.S. at 754. This is a routine task of appellate courts and the task that the Nevada Supreme Court undertook. No reweighing was involved.

The Ninth Circuit's premise that a state appellate court's ability to cure instructional error in an aggravating circumstance stems only from *Walton* is incorrect. It also stems from *Clemons*, *Maynard*, and *Godfrey v. Georgia*, 446 U.S. 420 (1986). Read together these opinions make it clear that state appellate courts may cure unconstitutionally vague aggravating circumstances whether the error occurred in a judge's decision or in a jury instruction.

The Ninth Circuit's holding that *Walton* does not allow a state appellate court to apply a narrowing

construction to an unconstitutional instruction when the penalty phase factfinder has been a jury is also a new rule of law, the application of which and announcement in this action is barred by *Teague v. Lane*, 489 U.S. 288 (1989).

The Ninth Circuit's decided that the Nevada Supreme Court did not apply "close appellate scrutiny" as required by *Walton*. The Ninth Circuit's decision is based on nothing other than speculation and its quibbling with the Nevada Supreme Court's language. The Ninth Circuit's decision does not comport with the presumption that state courts know and follow the law; or with 28 U.S.C. § 2254(d)'s "highly deferential standard for evaluating state-court rulings," which demands that state court decisions be given the benefit of the doubt.

Even if the Court concludes, as did the Ninth Circuit, that the Nevada Supreme Court's comments fall short of the mark, this Court should be guided by *Richmond v. Lewis*, 506 U.S. 40, 52 (1992). In that case, this Court should enter an order directing the Ninth Circuit to order the district court to grant the petition for writ of

habeas corpus unless the State of Nevada within a reasonable time either corrects the purported constitutional error in Valerio's death sentence or vacates the sentence and imposes a lesser sentence consistent with law. Similarly, if the only deficiency is that the Nevada Supreme Court failed to give close enough scrutiny to satisfy the Court, the Nevada courts should be allowed another opportunity to do so.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court grant certiorari and reverse the judgment of the Ninth Circuit Court of Appeals.

BRIAN SANDOVAL
Attorney General of the
State of Nevada

GERALD GARDNER*
Chief Deputy Attorney General
Criminal Justice Division
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Telephone: (702) 486-3396

Counsel for Petitioners
* Attorney of Record

APPENDICES

APPENDIX A

JOHN ESPIREDION VALERIO

Name

#26214

Prison Number

ELY STATE PRISON

Place of Confinement

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN ESPIREDION VALERIO, CV-N-96-00362-HDM (RAM)

Petitioner,

vs. RENEWED PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254 BY A PERSON IN STATE CUSTODY (DEATH PENALTY CASE)

ROBERT BAYER, Director, Nevada Department of Prisons; E. K. McDANIEL, Warden, Ely State Prison;

Respondents,

and

FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Additional Respondent.

_____/

Filed May 28, 1996

. . .

GROUND FOURTEEN.

Vague instruction re aggravating circumstances given to jury in penalty phase.

FACTS: In the penalty phase, the jury was instructed that they could find an aggravating circumstance if the crime involved "torture, depravity of mind or mutilation", and they did find such an aggravating circumstance without a specific finding as to the application of the instruction.

GROUND FIFTEEN.

Insufficient evidence of torture and mutilation.

FACTS: In the penalty phase, the jury found an aggravating circumstance on the basis of the crime involving "torture, depravity of mind or mutilation". There was, however, no evidence adduced in the penalty phase to show the cutting off or destruction of a portion of the victim's body nor was there evidence adduced from

which could be inferred an intent to cause cruel pain and suffering for sadistic purposes.

. . .

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN ESPIREDION VALERIO, **CV-N-96-362-HDM (RAM)**

Petitioner,

vs. ORDER

ROBERT BAYER, *et al.*,

Respondents.

_____/

Filed September 25, 1997

John Valerio has filed a petition for writ of habeas corpus challenging the validity of his state court conviction and sentence and sentence of death. Respondents have filed a motion to dismiss (#32) arguing that most of the claims in the amended petition (#23) are procedurally barred from being reviewed on the merits.

The issues Valerio raised on his direct appeal fall into two categories: prosecutorial misconduct at both the guilt and penalty phases of the trial, and prejudicial error regarding the admission of photographs at the trial. In his

first post-conviction proceeding, he raised three claims: the validity of the "depravity of mind" aggravating circumstance, the admission of testimony of Valerio's girlfriend, and ineffective assistance of both trial and appellate counsel. Valerio then commenced a federal habeas corpus action, CV-N-90-7-HDM. That action was dismissed to permit Valerio to return to state court to consider the new grounds for relief not previously raised in the state court proceedings. In the subsequent post conviction proceeding, the state supreme court held all of the claims to be procedurally defaulted because they were either new issues that should have been raised before (on direct appeal or in the first post conviction proceeding) or they were issues that had been raised in one of the earlier proceedings.

The doctrine of procedural default generally prohibits a federal court from considering a specific habeas issue where the state's highest court declined to reach the merits of that claim on procedural issues. *See Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982). Only upon a showing of "actual cause" and

"prejudice" is a federal court permitted to entertain such grounds. *Murray*, 477 U.S. at 492; *Engle*, 456 U.S. at 129.

In the second state post conviction proceeding, the state argued (*see* listing at p.8, Exhibit GGG, docket #30) and Valerio admitted (*see* listing at pp. 8-9, Exhibit QQQ, docket #30) that certain enumerated claims and subparts were new claims that should have been raised in prior state proceedings. However, Valerio argued some of the issues had been raised in prior state proceedings. The court finds that Valerio procedurally defaulted the following claims, for which he will need to show cause and prejudice before the claims will be reviewed on the merits: 4,[7] 5, 6, 7, 8,[8] 10, 11,[9] 12, 16(b, c,[10] d, e, g, j, k, l, n, o, p, t, u,[11] v, w,[12] & z), 17(a

---

[7] This ground was not previously raised as a separate substantive claim but was raised as a claim of ineffective assistance of counsel, *i.e.*, ground 16(q).

[8] Same as footnote 1, *i.e.*, ground 16(x).

[9] Same as footnote 1, *i.e.*, ground 16(s).

[10] Although the facts supporting this claim were included in the witness summary portion of the facts in the supplement in the first post conviction proceeding, they were not raised on appeal to the Nevada Supreme Court as a predicate for error.

[11] Same as footnote 4.

[12] The underlying substance of this prosecutorial misconduct

- i & k), 18, 19,[13] 20,[14] 21, 22, 23 & 24. The court further finds that, because the following issues were raised in prior state court proceedings and thus were not new grounds in the second state post conviction proceeding, they are not procedurally defaulted and can be addressed on the merits: 1, 2, 3, 9, 13, 14, 15, 16(f,[15] h, i, m, q,[16] r,[17] s,[18] x[19] & y), and 17(b, d, j & l).

Abuse of the Writ:

Valerio's prior federal petition for writ of habeas corpus was dismissed and he was ordered to return to state court to give the state courts an opportunity to review grounds he had never presented to them. After the commencement of this second federal action, Valerio added

---

claim during the penalty phase is raised as ground 13.

[13] Same as footnote 4.

[14] Same as footnote 4.

[15] *See* p.46, Exhibit F, docket #18.

[16] *See* p.48, Exhibit F, docket #18.

[17] *See* p.27, Exhibit J, docket #19.

[18] *See* p.49, Exhibit F, docket #18.

[19] *See* p.44, Exhibit F, docket #18.

three new grounds (#23) to the petition: additional allegation added to 16(h), new ground 17(m), and new ground 25. These three grounds were not part of the prior federal action. Moreover, these three grounds were not presented to the state court during the second state post conviction proceeding and are thus unexhausted grounds.

Respondents move for dismissal of these three grounds as an abuse of the writ based on *Farmer v. Angelone*, 98 F.3d 1548, 1560 (9th Cir. 1996), *cert. denied*, _____ U.S. _____, 117 S.Ct. 1474 (1997).

> We hold that a district court is not precluded as a matter of law from considering whether a petitioner has abused the writ by alleging in a subsequent federal habeas petition new and different grounds from those alleged in a prior federal habeas petition, whether or not that prior petition was determined on the merits. . . . In short, what we hold, and all that we hold, is that the district court was not precluded as [a] matter of law from considering whether Farmer's conduct in failing to allege grounds in prior petitions that he alleged the third time around (if he did) was abusive solely on account of the fact that his prior petitions were not

reviewed on the merits.

Valerio's one sentence response to the *Farmer* abuse of the writ argument is wholly inadequate; Valerio fails to give any reason whatsoever why these grounds were not asserted in the prior federal proceeding. *See* p.10, docket #42. This court finds that the inclusion of these three new grounds are an abuse of the writ.

It is therefore **ORDERED** that respondents' motion to dismiss (#32) is granted to the extent that Valerio has thirty (30) days to show cause and prejudice to overcome the procedural default regarding grounds 4, 5, 6, 7, 8, 10, 11, 12, 16 (b, c, d, e, g, j, k, l, n, o, p, t, u, v, w & z), 17 (a, c, d, e, f, g, h, i & k), 18, 19, 20, 21, 22, 23 & 24. Respondents shall have twenty (20) days to respond, and Valerio fifteen (15) days to reply.

It is further **ORDERED** that grounds 16(h) (as supplemented #23 in the amendment to the petition), 17(m) and 25 are dismissed as an abuse of the writ.

In all other respects the motion to dismiss is denied without prejudice to renew.

The petitioner's request for an evidentiary hearing (#22) is denied without prejudice to renew after compliance

with this order.

Dated this 25th day of September, 1997.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN ESPIREDION VALERIO, CV-N-96-362-HDM (RAM)

Petitioner,

vs. ORDER

ROBERT BAYER, *et al.*,

Respondents,

_____/

Filed February 10, 1998.

Petitioner John Valerio was ordered to show cause and prejudice to overcome procedural default. *See* order at docket #64. Valerio responds (#73 & #75) admitting that he cannot show cause and prejudice to overcome procedural default as to the following claims: 4, 8, 10, 11, 12, 16(c, k, n & p), 17(a, c, d, h, i & k) & 23. Therefore, these claims shall be dismissed.

Claims 5, 6 & 7 (prejudicial admission of certain evidence and testimony) were determined to be procedurally defaulted because they were not raised by trial

and/or appellate counsel, but were instead raised during the second state post conviction proceeding. To overcome the procedural default, Valerio argues that he has shown cause and prejudice because of the failure of both his trial and appellate counsel to have raised these issues timely. This he asserts constitutes ineffective assistance of counsel. A denial of the Sixth Amendment right to effective assistance of counsel establishes both cause and prejudice to excuse a procedural default. *See, Coleman v. Thompson,* 501 U.S. 722, 752-54 (1991). In order to demonstrate ineffective assistance of counsel, Valerio must meet the test established by *Strickland v. Washington,* 466 U.S. 668 (1984). The *Strickland* test requires Valerio to show that counsel's performance was deficient, i.e., "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Id.* at 690. He must also show that the "deficient performance prejudiced the defense," i.e., that "counsel's errors were so serious as to deprive [Valerio] of a fair trail, a trial whose result is reliable." *Id.*

Under *Strickland*, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* In reviewing Valerio's claims, the court must determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

In the event counsel erred in presenting Valerio's defense, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Valerio must demonstrate that the error prejudiced the defense to compel a finding of ineffective assistance of counsel. *Id.* at 692. The appropriate test for prejudice is: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *Id.* At 694.

Therefore, Valerio must show that there is a reasonable probability that had trial counsel objected to the admission of the evidence and testimony, his objections would have been granted and that if the jury would not have been allowed to consider the evidence, the jury would not have convicted him. Here, the evidence against Valerio was substantial. Even if the evidence relative to claims 5, 6 & 7 had been excluded, the evidence independent of these claims was more than sufficient to connect Valerio to the murder. Valerio has failed to show that he would not have been convicted if this evidence has been excluded. Consequently, Valerio's claim of ineffective assistance of trial counsel is insufficient to overcome the procedural default of claims 5, 6 & 7.

Valerio also contends that he has shown cause and prejudice sufficient to overcome the procedural default of the following claims because post conviction counsel was ineffective for not having raised them: claims 16(b, c, d, e, g, j, k, l, n, o, p, t, u, v, w & z) (ineffective assistance of

counsel of trial counsel), claims 17(a - i & k) (ineffective assistance of appellate counsel), claim 18[20] (cumulative error) and claims 19 - 24 (ineffective assistance of trial counsel). However, for there to be ineffective assistance of counsel as to these claims, there must be a Sixth Amendment right to counsel. Valerio has no Sixth Amendment right to counsel in a post conviction proceeding. *See, Coleman v. Thompson, supra; Bonin v. Vasquez,* 999 F.2. 425 (9th Cir. 1993).

Finally, Valerio argues that he might be able to show cause and prejudice to overcome the procedural default of claims 16(b, c, d, e & g), 19, 20, 21 & 24. He maintains these claims were unknown to his prior counsel because the facts necessary to support them were concealed by state officials. This claim is purely speculative. Counsel points to no facts in this record that would support these claims. *See* ln 11-15 p.14, docket #73.

In its prior order, this court failed to decide the issue

---

[20] Valerio erroneously asserts in his reply (p.4-5, docket #75) that he did not address claim 18 in his response (#73) because this court did not order him to address claim 18. However, claim 18 was specifically addressed in the order (ln 4 p.3 & ln 6 p.5, docket #64) and, moreover, Valerio did present argument in his response regarding claim 18. *See,* ln 12 p.12, docket #73.

of procedural default as to claims 16(a & aa-kk), and improperly determined that claims 17(b & d) were procedurally defaulted. Claims 16(a)[21] and 17(b & d) are not procedurally defaulted.[22] To the contrary, claims 16(aa-kk) are procedurally defaulted; both respondents and Valerio admitted in the state court proceedings that these subparts were procedurally defaulted, and respondents contended in their motion to dismiss (#32) that these claims were procedurally defaulted.

As determined above, Valerio has not shown cause and prejudice regarding the other procedurally defaulted subparts in claim 16. If Valerio wishes to attempt to show cause and prejudice regarding procedurally defaulted claims 16(aa-kk), then he should do so without delay. The second amended petition is ready for decision on the merits of the remaining claims.

---

[21] Respondents never argued in their motion to dismiss (#32) that claim 16(a) was procedurally defaulted, and Valerio has never admitted that it was defaulted. Moreover, respondents did not contend in the state court proceeding that claim 16(a) was procedurally defaulted, and the state court never made a finding of procedural default regarding this claim.

[22] Respondents never argued in their motion to dismiss (#32) that claims 17(b & d) were procedurally defaulted.

It is therefore **ORDERED** that Valerio has not shown cause and prejudice to overcome the procedural default regarding claims 4, 5, 6, 7, 8, 10, 11, 12, 16(b, c, d, e, g, j, k, l, n, o, p, t, u, v, w & z), 17(a, c, e, f, g, h, i & k), 18, 19, 20, 21, 22, 23 & 24. Accordingly, these claims are dismissed.

It is further **ORDERED** that if Valerio wishes to attempt to show cause and prejudice regarding claims 16(aa-kk), he shall do so within fifteen (15) days. There shall be no extensions of time.

It is further **ORDERED** that oral argument will be held on all exhausted claims that have not been procedurally defaulted (claims 1, 2, 3, 9, 13, 14, 15, 16[a, f, h, I, m, q, r, s, x & y], and 17[b, d, j & l]) on April 20 at 9:00 A.M. Each side will be allowed thirty (30) minutes for argument.

Dated this 6th day of February, 1998.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN ESPIREDION VALERIO, CV-N-96-362-HDM (RAM)

Petitioner,

vs. ORDER

ROBERT BAYER, *et al.*,

Respondents,

_____/

Filed April 10, 1998.

In its prior order (#76), this court dismissed claims 4, 5, 6, 7, 8, 10, 11, 12, 16(b, c, d, e, g, j, k, l, n, o, p, t, u, v, w & z), 17(a, c, e, f, g, h, i & k), 18, 19, 20, 21, 22, 23 & 24 because petitioner John Valerio had failed to show cause and prejudice to overcome procedural default. In the same order, this court determined that Valerio had procedurally defaulted claims 16(aa-kk) and gave him an opportunity to show cause and prejudice. In his response (#77), Valerio acknowledges that the only argument he can present is the same argument rejected in the prior order (#76). *See*, lines

14-19, p.2, docket #77. As previously determined, cause and prejudice cannot be predicated upon ineffective assistance of post-conviction counsel because there is no right to counsel in post-conviction proceedings. *See, Coleman v. Thompson, supra; Bonin v. Vasquez*, 999 F.2. 425 (9th Cir. 1993).

It is therefore **ORDERED** that Valerio has not shown cause and prejudice to overcome the procedural default regarding claims 16(aa-kk). Accordingly, these claims are dismissed.

Dated this 10th day of April, 1998

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN ESPIREDION VALERIO, CV-N-96-362-HDM (RAM)

Petitioner,

vs. MEMORANDUM DECISION AND ORDER

ROBERT BAYER, *et al.*,

Respondents.

Filed August 19, 1998.

Petitioner John Espiredion Valerio filed a petition for writ of a habeas corpus pursuant to 28 U.S.C. § 2254 challenging the validity of his state court conviction and sentence of death. Respondents filed an answer and a motion to dismiss. In a previous order, the court concluded that several of Valerio's claims were barred or an abuse of the writ. Pending are Valerio's remaining grounds for relief. For the reasons set forth below, Valerio's petition for writ of habeas corpus is denied.

BACKGROUND

Karen Sue Blackwell was last seen on September 19, 1986, before she left her home to visit Valerio. One week later her body was discovered wrapped in blankets in a parked car in an apartment complex parking lot. Ms. Blackwell died from multiple stab wounds to the head, neck, chest and abdomen area. An abundance of physical evidence connected Valerio to the crime -- among other things Ms. Blackwell was found wrapped in Velerio's bedding, Valerio's jacket pocket contained her key ring and an address book with her false name and business number, and blood was discovered on the carpet and mini-blinds in Valerio's bedroom. In addition Valerio's girlfriend testified at trial that on the date Ms. Blackwell was last seen, Valerio failed to meet her during her break in the evening shift and he was over an hour late in picking her up at the end of her shift.

On January 14, 1988, Valerio was convicted by a jury of first degree murder with the use of a deadly weapon. *See* #29, ex.KK. After a separate penalty hearing, the jury imposed the sentence of death. *See* #29, ex.MM. Valerio's

direct appeal to the Nevada Supreme Court was denied. *See* #19, ex.J and ex.M. Thereafter, Valerio filed his first state petition for post-conviction relief. *See* #18, ex.C. Valerio's petition was denied by the district court and the Nevada Supreme Court denied his appeal. *See* #18, ex.E and ex.I. Valerio then filed a petition for writ of habeas corpus with this court. *See Valerio v. Godinez*, CV-N-90-7-HDM. That petition was dismissed as a mixed petition.

Valerio then filed a second petition for post-conviction relief in the state court, *see* #30, ex.FFF, which was denied by the state district court and supreme court on procedural grounds. *See* #30, ex.PPP and ex.YYY.

After exhausting his state remedies, Valerio returned to federal court and filed his present petition. After counsel was appointed and an amended petition was filed, the court dismissed grounds 16(h), 17(m) and 25 of the amended petition as an abuse of the writ. *See* #64. The court also dismissed the following grounds as procedurally barred: 4, 5, 6, 7, 8, 10, 11, 12, 16 (b-e, g, j-l, n-p, t- w, z & aa-kk), 18, 19, 20, 21, 22, 23 and 24. *See* ## 76 & 79.

In the remaining claims, Valerio argues he is entitled to habeas relief because: (1) photographs of-the victim's body were admitted at trial; (2) a photograph of the victim and her daughter was admitted at trial; (3) his ex-girlfriend's personal opinion about his guilt was admitted during trial; (4) the prosecutor made an improper closing argument in the penalty phase; (5) the prosecutor made an improper and prejudicial closing argument during the guilt phase; (6) the trial court's jury instruction on aggravating circumstances was vague; (7) there was insufficient evidence to support a finding that the crime involved torture, depravity of mind or mutilation; (8) trial counsel was ineffective,[23] and (9) appellate counsel was ineffective.[24]

---

[23] The remaining factual allegations supporting Valerio's ineffective assistance of trial counsel claim (ground sixteen of his petition) include: (A) failure to investigate his girlfriend's alleged involvement in a prior murder; (F) failure to investigate entries in the victim's date book; (H) failure to an investigate individual seen exiting the victim's vehicle; (I) failure to secure the victim's answering machine tape; (m) failure to move for the preservation and disclosure of the victim's car, answering machine tape, fingerprint exemplars and photo line-up; (Q) failure to object or move for mistrial with respect to testimony that Valerio went to his home to retrieve a gun; (R) failure to object or move for mistrial with respect to the prosecutor's improper closing argument during the guilt phase; (S) failure to object or move for a mistrial with respect to testimony of the victim's daughter; (X) permitted the introduction of evidence of other criminal charges pending against Valerio; (Y) failure to cross-examine Valerio's girlfriend regarding her involvement in a prior murder.

DISCUSSION

A. *Grounds One and Two – Improperly Admitted Photographs*

Valerio first contends that the trial court improperly admitted photographs revealing the stab wounds on the victim and a picture of the victim and her daughter. "The admission of photographs lies largely within the discretion of the trial court, whose ruling will not be disturbed on due process grounds in a federal habeas corpus proceeding unless the admission of the photographs rendered the trial fundamentally unfair." *Batchelor v. Cupp*, 693 F.2d 859, 865 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983) (*citing Cooks v. Spalding*, 660 F.2d 738, 739 (9th Cir. 1981), *cert. denied*, 455 U.S. 1026 (1982)). Moreover, "it is not the province of a federal habeas corpus court to reexamine state-court

---

[24] The remaining factual allegations supporting Valerio's ineffective assistance of appellate counsel claim (ground seventeen of his petition) include: (B) failure to raise issues arising from testimony of his girlfriend's opinion as to Valerio's guilt; (D) failure to raise issues arising from testimony of the victim's daughter; (J) failure to raise issues arising from a vague penalty phase instruction regarding "depravity of mind," and (L) representing to the appellate court that Valerio was accorded a fair trial

determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

In this case, neither of Valerio's allegations demonstrate that his trial was fundamentally unfair and violated his right to due process. The trial judge reviewed the photographs of the victim's body and admitted some but not all of the photographs. *See* #27, ex.FF, pp.94-112. The photographs that were admitted showed the more than 40 stab wounds inflicted upon the victim. *Id.* On appeal, the Nevada Supreme Court questioned the relevancy of the pictures but concluded that even if the trial court abused its discretion in admitting the pictures, the error was harmless. *See* #19, ex.M at p.3. The supreme court also recognized that Valerio conceded the photographs were relevant to the state's case. *Id.* The court concludes that Valerio has failed to establish that the admission of the photographs violated his right to due process.

Valerio has also failed to demonstrate that the admission of a photograph of the victim and her daughter caused his trial to be fundamentally unfair. The Nevada

Supreme Court determined that since the victim's daughter testified during the trial, the admission of the photograph did not unfairly prejudice Valerio. *See* #19, ex.M at p.2. The admission of this evidence did not violate Valerio's right to due process.

B. *Ground Three – Witness's Personal Opinion*

Valerio next contends the admission of his ex-girlfriend's opinion about his guilt was prejudicial. In reviewing a collateral challenge based on a "trial-type" constitutional error, a federal court will not reverse the conviction unless the petitioner shows that the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The admission of testimony can only violate the due process clause if there are no permissible inferences which the jury could have drawn from the testimony. *See Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991) (petitioner not entitled to relief unless admission of evidence violated his right to a fair trial under the due process clause).

During trial when asked by the prosecutor why she stopped visiting Valerio, his ex-girlfriend stated:

> Well, John and I were going to be married so I was in love with him and I refused to believe the fact that he did do it. And the more that I saw him, the more my views were changing on that, and I just couldn't handle seeing him any more so I quit.

See #28, ex.II at pp.273-274. The jury could have drawn the permissible inference from this testimony that Valerio's ex-girlfriend's feelings about Valerio were changing and that she was not going to marry him. Even if the jury inferred from the statement that Valerio's ex-girlfriend believed he committed the murder, the evidence linking Valerio to the crime was sufficiently substantial so that the court cannot find that the testimony had a substantial and injurious effect on the jury's verdict. Therefore, the admission of this testimony did not deny Valerio a fair trial.

C. *Ground Nine - Improper Closing Argument During Guilt Phase*

Valerio contends the prosecutor made improper and prejudicial statements in his closing argument during the guilt phase. To obtain relief for a claim of prosecutorial

misconduct, Valerio must show that the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

During closing arguments, the prosecutor stated:

> The victim is a woman, a mother, who happened to be a hooker who got killed. And she deserves whatever sympathy we give to somebody in a case. She deserves the same as a nun, as anybody, because she is a human life that deserves to continue and not have it taken away by somebody like that sitting there so pretty and calm and unaffected by all of these proceedings.

See #28, ex.JJ, at p.477. Valerio argues this statement was made to elicit sympathy from the jury and it was prejudicial. The statement about the victim being a mother and a hooker was true. Although the prosecutor's attempts to evoke sympathy from the jury were clearly improper, the jury was instructed by the trial court that the statements, arguments and opinions of the attorneys were not to be considered as evidence. *See* #29, ex.TT, No.26. Additionally, the jury was instructed by the trial court that their "verdict many never be influenced by sympathy, prejudice or public opinion." *See*, #29, ex.TT, No.32.

Consequently, the court cannot find that the prosecutor's remarks to the jury prevented a fair trial.

D. *Ground Thirteen - Improper Closing Argument During Penalty Phase*

Valerio next contends that during the penalty phase the prosecutor improperly referred to possible future killings by Valerio and referred to community standards of morality and further killings by others.[25] Improper prosecutorial remarks do not constitute a *per se* violation of a defendant's rights. *See Darden*, 477 U.S. at 181. Such comments are reviewed pursuant to the "narrow" due process standard to determine if they rendered the proceedings fundamentally unfair. *Darden*, 477 U.S. at 181; *Jeffries v. Blodgett*, 974 F.2d 1179, 1189 (9th Cir. 1992). In making this determination, the court must look at "the nature of the comments, the nature and quantum of the

---

[25] In his traverse, Valerio presents several other issues regarding the prosecutor's statements during his summation. However, a traverse is not the proper pleading to raise additional grounds for relief. In order for the state to be properly advised of additional claims, they should be presented in an amended petition or, as ordered in this case, in a statement of additional grounds. Then the state can answer and the action can proceed. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994). Therefore, the court will not address the new arguments presented in the traverse which were never raised in Valerio's petition or the amendment to his petition.

evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." *Darden*, 477 U.S. at 182. The Nevada Supreme Court, in denying Valerio's direct appeal, recognized the prosecutor's statements were inappropriate but held that Valerio's sentence was not imposed under the influence of passion, prejudice or any arbitrary facts. *See* #19, Ex.M at p.6. In federal habeas corpus proceedings, deference must be granted to the findings of state appellate courts as well as state trial courts. *See* 28 U.S.C. § 2254(d)(1)

Valerio challenges the prosecutor's reference to the potential for future killings by Valerio based upon evidence of a prior assault and battery conviction and evidence of an uncharged robbery. Errors of state law do not necessarily constitute a denial of due process. *See Oxborrow v. Eikenberry*, 877 F.2d 1395, 1400 (9th Cir.), *cert. denied*, 493 U.S. 942 (1989); 28 U.S.C. § 2254(a). "A mere error of state law is not a denial of due process." *Engle v. Isaac*, 456 U.S. 107, 121 n. 21 (1982). "[D]enial of due process in a criminal trial 'is the failure to observe that fundamental fairness essential to the very concept of justice... . [The Court] must find that

the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.'" *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986), *cert. denied*, 479 U.S. 1068 (1987), quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941). During closing arguments the prosecutor made several references to the unlikeliness of Valerio being rehabilitated; however he never stated that Valerio would kill again. Even assuming, as Valerio suggests, the prosecutor implied in his first summation that Valerio would kill again, this did not violate his right to due process. The Supreme Court has held that the future dangerousness of a defendant is a proper consideration for the jury in a capital sentencing proceeding. *See California v. Ramos*, 463 U.S. 992, 1002-1003 (1983). Since all of the prosecutor's comments concerning the likelihood of Valerio being a threat to society were made during his first summation, defense counsel was given an opportunity to respond to the prosecutor's comments. *See generally, Skipper v. South Carolina*, 476 U.S. 1, 5, n.1 (1986) (where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty,

elemental due process requires that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain). Valerio also contends the prosecutor's statements referring to community standards of morality and future killings by others played on the fears of the jury and thus violated his right to due process. In the statement which Valerio challenges, the prosecutor explained to the jurors why the legal system requires juries to decide what sentences are appropriate and why they should sentence Valerio to death.

The state court instructed the jurors that arguments and statements by lawyers are not evidence and should not be considered in deciding the facts. *See* #29, ex.PP at No.18. Thus, after reviewing the totality of the circumstances, the court concludes there is no reasonable probability that the prosecutor's statements regarding Valerio's ability to be rehabilitated, nor the prosecutor's statements regarding community standards and possible future killings, materially affected the outcome of the sentencing phase of the trial. While inappropriate, the comments of the

prosecutor did not render Valerio's trial fundamentally unfair in violation of his right to due process.

E. *Ground Fourteen – Vague Jury Instruction*

The jury sentenced Valerio to death after deciding that the one mitigating circumstance[26] did not outweigh the two aggravating circumstances.[27] Valerio challenges the validity of the death sentence arguing that one of the aggravating circumstances--"depravity of mind"--is the result of an unconstitutionally vague jury instruction. "Depravity of mind" was defined for the jury in Instruction #10 as follows:

> The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

The jury was not instructed on the definition of torture or

---

[26] The jury found as a mitigating factor that Valerio was gainfully employed at the time.

[27] The jury found as aggravating circumstances that Valerio had a prior felony conviction involving violence and that the murder involved "depravity of mind" or mutilation.

mutilation.

The "depravity of mind" instruction given to the jury stated that the murder "involved torture, depravity of mind or the mutilation of the victim." The instruction is defective because the disjunctive "or" does not require a finding of both depravity of mind and either torture or mutilation. *See Godfrey v. Georgia*, 446 U.S. 420 (1980), and *Deutscher v. Whitley*, 884 F.2d 1152 (9th Cir. 1989), *rev'd and rem'd sub nom on other grounds, Angelone v. Deutscher*, 500 U.S. 901 (1991). The definition provided to the jury for "depravity of mind" did not meet the standard set forth in *Godfrey*.[28]

In *Godfrey*, there was no evidence of torture or aggravated battery. Consequently, the Supreme Court found the death sentence unable to withstand constitutional scrutiny: "The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.* at 433. Therefore, a

---

[28] The instruction failed to "channel the sentencer's discretion by 'clear and objective standards,' *Gregg v. Georgia*, 428 U.S. 153, 198 (1976), that provide 'specific and detailed guidance,' *Proffitt v. Florida*, 428 U.S. 242, 253 (1976), and that 'make rationally reviewable the process for imposing a sentence of death.' *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976)." *Godfrey*, 446 U.S. 428.

finding of depravity of mind without the additional evidence of torture or aggravated battery was constitutionally insufficient to support a death sentence.

In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the Supreme Court found Oklahoma's aggravating circumstance of "especially heinous, atrocious, or cruel" to be unconstitutionally vague for the same reasons expressed in *Godfrey*. The Court suggested that if a state interprets "especially heinous, atrocious, or cruel" as requiring some form of torture or serious physical abuse, then the aggravating circumstance would not be unconstitutionally vague as applied in the particular case. The Court specifically affirmed this suggestion for a saving interpretation that requires some form of torture or serious physical abuse in *Walton v. Arizona*, 497 U.S. 639 (1990) (direct appeal), and *Lewis v. Jeffers*, 497 U.S. 764 (1990) (habeas review). In *Deutscher v. Whitley*, 884 F.2d 1152 (9th Cir. 1989), *rev'd and rem'd sub nom on other grounds, Angelone v. Deutscher*, 500 U.S. 901 (1991), the Ninth Circuit found Nevada's "depravity of mind" aggravating circumstance to be unconstitutionally vague. In *Rogers v. State*, 101 Nev.

457, 705 P.2d 664, 671 (1985), *cert. denied*, 476 U.S. 1130 (1986), the Nevada Supreme Court recognized the need to apply a saving interpretation of the state's "depravity of mind" instruction; the court found the existence of facts evidencing torture in addition to "depravity of mind."

Valerio's direct appeal (which did not raise the depravity of mind issue) was decided on September 6, 1989, after the *Godfrey* and *Rogers* decisions. Moreover, Valerio's direct appeal was decided just one week after the Ninth Circuit held that Nevada's "depravity of mind" instruction was unconstitutionally vague. However, the error in not sufficiently channeling the sentencer's discretion was cured during Valerio's first state post-conviction proceeding. The district court specifically analyzed the applicability of *Godfrey* and *Robins* and determined that there was sufficient evidence of serious physical abuse to support the depravity of mind aggravating circumstance. *See* ex.E. The Nevada Supreme Court concurred, stating, "In this case, evidence that Ms. Blackwell was stabbed more than forty-five times, had 'defensive wounds' on her hands and arms, and died not from one wound but from all wounds combined,

satisfies us that she was subject to torture and/or serious physical abuse before she died." *See* #18, ex.I at fn.2. In *Walton v. Arizona*, 497 U.S. at 654, the Supreme Court held that "a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined...." citing *Clemons v. Mississippi*, 494 U.S. 738 (1990). Accord., *Lewis v. Jeffers*, 497 U.S. at 779 ("[I]f a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting . . . the sentencer's discretion in imposing the death penalty,' *Cartwright*, 486 U.S. at 362, has been satisfied."). As the Supreme Court stated, "Where the issue is solely whether a state court has properly found the existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts 'to peer majestically over the state court's shoulder so that they might second-guess its interpretation of facts that quite reasonably--perhaps even quite plainly--fit within the statutory language.'"

Lewis v. Jeffers, 497 U.S. at 780, quoting *Godfrey*, 446 U.S. at 450. Here, the record fully supports the state court's finding of serious physical abuse. The Nevada Supreme Court has adopted a "constitutionally narrow construction of the facially vague aggravating circumstance." Accordingly, the depravity of mind instruction given in the context of the facts of this case, and as construed by the Nevada Supreme Court, was not unconstitutionally vague.

F. *Ground Fifteen – Insufficient Evidence of Torture and Mutilation*

Valerio argues that there was no evidence of torture or mutilation because there was no evidence produced during the penalty phase to show the cutting off or destruction of a portion of the victim's body, nor was there evidence introduced that would permit an inference that the defendant intended to cause cruel pain and suffering for sadistic purposes. The Supreme Court has held that a finding of "serious physical abuse" would support an otherwise vague aggravating circumstance. *Maynard v. Cartwright*, 486 U.S. at 364-65. As indicated, the Nevada Supreme Court has adopted a narrowing interpretation of

the depravity of mind aggravating circumstance to require "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to an aggravating circumstance based in part upon depravity of mind." *Robins*, 798 P.2d at 570. As the Nevada Supreme Court has found, the facts support a finding that Ms. Blackwell was subjected to serious physical abuse. That finding, coupled with the narrowing construction given by the Nevada Supreme Court to the facially vague aggravating circumstance, satisfied the constitutional requirement of "channeling and limiting . . . the sentencer's discretion in imposing the death penalty." *Cartwright*, 486 U.S. at 362.

G. *Ground Sixteen – Ineffective Assistance of Counsel*

Valerio argues that he was deprived of effective assistance of counsel in violation of the Sixth Amendment. The court evaluates Valerio's claim under the two-part *Strickland* test. First, Valerio must show that counsel's representation was deficient. Second, Valerio must show his counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

In applying the *Strickland* test, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* In reviewing Valerio's allegations, the court must determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

In the event counsel erred in presenting Valerio's defense, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Valerio must demonstrate that the error prejudiced the defense to compel a finding of ineffective assistance of counsel. *Id.* at 692. The appropriate test for prejudice is: "[A] reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In assessing Valerio's claims, the court must be mindful that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690, 691. Additionally, counsel has no duty to raise frivolous claims. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

1. Grounds 16(A), (F), (H)

Valerio first claims trial counsel provided ineffective representation by failing to investigate: (1) his girlfriend's involvement with another murder; (2) the possible involvement of the victim's ex-husband in the murder; and (3) the individual observed exiting the victim's vehicle. The record does not support Valerio's contention. Valerio's trial counsel investigated Valerio's girlfriend's involvement in another murder, *see* #29, ex.BBB at pp.69-70, and the person observed exiting the victim's vehicle, *id.* at pp.153-155.

Other than Valerio's conclusory statements, there is no evidence showing that counsel failed to investigate the victim's ex-husband or that there is a reasonable probability that evidence produced through an investigation would have produced a different result.

2. Grounds 16(I), (M)

Valerio also contends his trial counsel failed to secure the victim's answering machine and failed to move for the preservation and disclosure of the victim's car, answering machine, fingerprint exemplars and photo line-up. Contrary to Valerio's assertion, the record demonstrates that trial counsel attempted to obtain the answering machine but was unsuccessful. *See* #29, ex.BBB at pp.91-92. Counsel made a tactical decision later in the investigation not to obtain the victim's answering machine because she was concerned Valerio's defense would be impaired if the tape contained his voice. *See* #29, ex.BBB at p.162. Tactical decisions that are objectively reasonable do not rise to an ineffective assistance of counsel claim. *See Hensley v. Crist*, 67 F.3d 181, 185 (9th Cir. 1995).

3. Grounds 16(Q), (R), (S)

Next, Valerio alleges trial counsel failed to object and move for mistrial with respect to: (1) his girlfriend's testimony; (2) the prosecutor's improper closing argument during the guilt phase; and (3) the testimony of the victim's daughter. Valerio has failed to show that his counsel's conduct did not constitute sound trial strategy or that he was prejudiced by his counsel's actions. These claims do meet the requirements of *Strickland, supra.*

4. Ground 16(X)

Valerio also contends that trial counsel's representation was inadequate because she improperly presented evidence of other criminal charges pending against him. During cross-examination, defense counsel questioned Valerio's girlfriend about the location of her car on the night of the murder. During the examination Valerio's girlfriend disclosed to the jury that the car was being held as collateral for Valerio's bail in a previous crime. The Nevada Supreme Court, in ruling upon Valerio's state post-conviction petition, determined trial counsel did not err in asking Valerio's girlfriend about her car. *See* #18, ex.I at p.2. In addition, Valerio has failed to

show how trial counsel's actions affected the outcome of his trial. In federal habeas corpus proceedings, deference must be granted to the findings of state appellate courts as well as state trial courts. *McKenna v. McDaniel*, 65 F.3d 1483, 1490 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1451 (1996); 28 U.S.C. § 2254(d)(1).

5. Ground 16(Y)

Finally, Valerio claims trial counsel was ineffective for failing to cross-examine his girlfriend regarding her involvement in a prior murder. A review of the record reveals that counsel's failure to cross-examine Valerio's girlfriend about a prior murder, where she was never charged with an offense, was an informed tactical decision that was reasonable under the circumstances. *See Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). Valerio has failed to show that his counsel's representation was deficient or that he was prejudiced by any alleged deficiencies in trial counsel's representation.

I. Ground Seventeen - Ineffective Assistance of Appellate Counsel

Valerio argues he was denied effective assistance of appellate counsel. Claims of ineffective assistance of appellate counsel are reviewed according to the *Strickland* standards. *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989).

1. Ground 17(B)

First, Valerio argues that appellate counsel was ineffective because he failed to raise issues arising from his girlfriend's testimony concerning his guilt. As the court has found, Valerio has failed to show how his girlfriend's testimony regarding his guilt denied him a fair trial. *See* Ground 3. Furthermore, appellate counsel's decision to focus on the penalty phase rather than the guilt phase does not constitute ineffective assistance of counsel. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible." *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). In addition the Nevada Supreme Court's decision that appellate counsel rendered effective representation, see #18, ex.I at p.2, should be given deference by this court. *See* 28 U.S.C. § 2254(d)(1). Accordingly, this court finds

that appellate counsel was not ineffective for failing to raise these issues on appeal.

2. Ground 17(D)

Valerio next claims appellate counsel was ineffective when he failed to raise issues relating to the testimony that Valerio returned to his home to obtain a gun. Appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by a defendant. *See Jones*, 463 U.S. at 751-54; *Miller*, 882 F.2d at 1434, n.10. Furthermore, Valerio does not point to any evidence in the record showing that testimony regarding the gun prejudiced him at trial. *Jones*, 463 U.S. at 751-52. Consequently, Valerio has not overcome the presumption that his counsel's decision not to raise this issue on appeal was sound strategy. *Strickland*, 466 U.S. at 689.

3. Ground 17(J)

Valerio also contends appellate counsel was ineffective when he failed to argue that the instruction on "depravity of mind" aggravating circumstance given to the jury during the penalty phase was unconstitutional. The aggravating circumstance instruction used in Valerio's case was found to be unconstitutional by the

Ninth Circuit in August 1989. *See Deutscher v. Whitley*, 884 F.2d 1152, 1162-63 (9th Cir. 1989). The Nevada Supreme Court held a similar instruction was unconstitutional in 1990. *See Robins v. State*, 106 Nev. 611, 798 P.2d 558 (1990), *cert. denied*, 499 U.S. 970 (1991). At the time appellate counsel filed Valerio's direct appeal, in October 1988, neither of these cases had been decided. Appellate counsel's failure to challenge the aggravating circumstances jury instruction during Valerio's direct appeal cannot be considered deficient and was reasonable under the law as it existed at that time. *See Lilly v. Gilmore*, 988 F.2d 783, 789 (7th Cir.), *cert. denied*, 510 U.S. 852 (1993). In addition, Valerio has failed to show how he was prejudiced by his counsel's actions.

4. Ground 17(L)

Valerio also alleges appellate counsel was ineffective when he acknowledged to the appellate court that Valerio was accorded a fair trial. Valerio's appellate counsel acknowledged that he did not find any glaring errors in the guilt phase of Valerio's trial, but he did not concede that Valerio's entire trial was fair. *See* #29, ex.BBB

at p.142. Additionally, the Nevada Supreme Court determined that appellate counsel's tactical decision to focus on the penalty phase of the trial was reasonable. *See* #18, ex.I. Valerio has failed to show that he received ineffective assistance of appellate counsel or that he was prejudiced by appellate counsel's actions.

It is therefore ORDERED that John Espiredion Valerio's petition for a writ of habeas corpus is denied. The clerk shall enter judgment accordingly.

Dated this 19th day of August, 1998.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN E. VALERIO, CV-N-96-362-HDM (RAM)

Plaintiff,

v JUDGMENT IN A CIVIL CASE

ROBERT BAYER, *et al.*,

Defendants.

Filed August 20, 1998.

__ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

XX Decision by Court. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is denied.

August 20, 1998
Date

LANCE S. WILSON
Clerk

(By) Marcia Cooper
Deputy Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN ESPIREDION VALERIO, CV-N-96-362-HDM (RAM)

Petitioner,

vs.

ROBERT BAYER, *et al.*,

Respondents.

ORDER GRANTING CERTIFICATE OF APPEALABILITY

Filed October 15, 1998

Petitioner Valerio's petition for writ of habeas corpus was denied on the merits (#81). He filed a notice of appeal (#83). Petitioner was ordered to supplement the notice of appeal with an application for a certificate of appealability (#84). An application for a certificate of appealability must "indicate which specific issue or issues" meet the requirement of a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1 & 2) (as amended by the Anti-terrorism and Effective Death Penalty Act). Petitioner has responded (#85), in which he requests the issuance of a certificate of

appealability for ground 13, 14 & 15 specifically, and all other grounds generally.

It is therefore ORDERED that petitioner's application for a certificate of appealability (#85) is granted regarding grounds 13, 14 & 15. The application is denied for any other grounds.

Dated this 15th day of October, 1998.

/s/ _____
UNITED STATES DISTRICT JUDGE

APPENDIX H

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. ROBERT BAYER, Director of the Department of Prison; E.K. McDANIEL, Warden, Respondents-Appellees.	No. 98-99033 D.C. No. CV-N-96-00362-HDM **MEMORANDUM***

Filed April 19, 2000.

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued and Submitted December 6, 1999
San Francisco, California

Before: BROWNING, RYMER, and KLEINFELD, Circuit Judges.

John Valerio appeals the district court's denial of his Section 2254 habeas petition, raising three claims of

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

error. We decline to consider his first two arguments because they were not certified for appeal and affirm the district court's ruling on the remaining claim.**

I

Karen Blackwell disappeared on September 19, 1986 while on her way to meet Valerio. Her body was found in the trunk of a car parked at a Las Vegas apartment complex. Blackwell had been stabbed 45 times. The majority of the wounds occurred in groups of eight. Blackwell was stabbed 8 times in the head, 8 times in the back of the neck, 8 times in the front of the neck, 8 times in the left chest, and 8 times in the right chest. Blackwell's body was wrapped in Valerio's bedding and blood was found in Valerio's bedroom. The police seized Valerio's jacket in a search of his house, and the pockets contained Blackwell's keys and an address book with her name and number. In 1988, a jury convicted Valerio of the murder and sentenced him to death.

** After oral argument, we circulated a tentative draft disposition and requested input from the parties. We appreciate the assistance of counsel in providing comments on the draft disposition.

The Nevada jury found two aggravating circumstances: Valerio had a prior felony conviction involving violence; and the murder involved torture, depravity of mind, or mutilation. In September 1989, the Nevada Supreme Court affirmed his conviction on direct appeal. His first petition for state post-conviction relief was denied by the Nevada district court in November 1990; the Nevada Supreme Court affirmed in January 1992. Valerio then filed a section 2254 petition in federal court, which the district court dismissed as a mixed petition. Valerio returned to state court and raised these claims in a second petition for post-conviction relief. The Nevada Supreme Court denied this petition in a published opinion. *Valerio v. Nevada*, 915 P.2d 874 (Nev. 1996). Having exhausted his state remedies, Valerio returned to federal court and filed the current petition.

This petition asserts 24 grounds, including two based on ineffective assistance of counsel with numerous subparts. The district court dismissed 15 grounds and many of the ineffective assistance subparts as procedurally

barred,[29] and one claim as well as two more subparts for abuse of the writ.[30] The court rejected the remaining claims on the merits. It issued a Certificate of Appealability (COA) on Grounds 13 (improper closing argument by the prosecutor in penalty phase),[31] 14 (vague instruction on aggravating circumstance in penalty phase), and 15 (insufficiency of the evidence of torture and mutilation), denying certification on all other Grounds.

II

Valerio argues that his claims were neither procedurally defaulted nor abusive. Because these issues were not certified, however, we may not consider them on appeal. Valerio contends that we nevertheless should do so for several reasons, none of which is persuasive.

First, he submits that the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2253(c)(3), which imposes the COA requirement, is

---

[29] Grounds 4; 5; 6; 7; 8; 10; 11; 12; 16(B)-16(E); 16(G); 16(J)-16(L); 16(N)-16(P); 16(T)-16(W); 16(Z); 16(AA)-16(KK); 17(A); 17(C); 17(E)-17(I); 17(K); 19; 20; 21; 22; 23; and 24.

[30] Claims #25, #16(h), and #17(m).

[31] Valerio does not pursue this issue on appeal.

inapplicable because his current habeas petition (filed after the Act's effective date) was a "renewal" of his original petition (filed before the effective date). He points out that we held in *Fuller v. Roe*, 182 F.3d 699, 702 (9th Cir. 1999), that the date of filing a § 2254 petition in district court is the operative date for purposes of the AEDPA. However, *Fuller* does not help Valerio because the district court did not retain jurisdiction when his original petition was dismissed for failure to exhaust. In these circumstances, the present petition does not "relate back" to the original petition or receive the benefit of the earlier date. *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999). Valerio's reliance on cases such as Jeffries v. Wood, 103 F.3d 827 (9th Cir. 1996), *In re Turner*, 101 F.3d 1323 (9th Cir. 1996), and *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), is misplaced because they consider the different question of whether a claim in a second or successive habeas petition may be pursued in federal court.

Regardless, Valerio maintains, he has made a "substantial showing of the denial of a constitutional right" and so meets the AEDPA's requirements for a COA. We

decline to rule on this question as well, because Valerio did not seek broader certification in this court as required by Ninth Circuit Rule 22-1(d).[32] When the district court grants only a limited certificate of appealability, as it did here, we will not consider uncertified issues unless the petitioner files a separate motion for broader certification within thirty-five days of the district court's entry of its order. *United States v. Kramer*, 195 F.3d 1129 (9th Cir. 1999) (declining to address claims briefed on appeal when not certified); *Hiivala v. Wood*, 195 F.3d 1098 (9th Cir. 1999) (same, but noting that panel may expand issues on which COA was denied by motions panel); *Gatlin v. Madding*, 189 F.3d 882, 887 (9th Cir. 1999) (petitioners who want broader certification than allowed by district court must file separate motion before motions panel before asking merits panel to

---

[32] Ninth Cir. Rule 22-1(d) provides in relevant part:

> If the district court denies a certificate of appealability in part, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification. Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issue(s) within thirty-five days of the district court's entry of its order denying a certificate of appealability.

broaden scope); *United States v. Cruz-Mendoza*, 147 F.3d 1069, 1074 (9th Cir. 1998), *as amended*, 163 F.3d 1149 (9th Cir. 1998) (responding to Circuit Rule 22-1 and deleting text that allowed briefing to expand COA). Valerio failed to follow this procedure, but suggests that it doesn't matter because he made the same argument in the district court and the state cannot be surprised. Surprise, however, is beside the point; appeals are to be taken only from issues where the petitioner has made the requisite threshold showing of denial of a constitutional right. Appeals in any event may not generally be taken except from issues raised in the first instance in the district court, so it is a necessary, but insufficient, predicate that the argument have been made in that court. Valerio's approach would effectively gut both Rule 22-1 and the COA requirement, and we decline to adopt it.

Finally, Valerio maintains that the district court's refusal to entertain a number of his substantive claims based on a purported default which is not federally cognizable is itself a denial of a constitutional right because it is tantamount to an improper suspension of the writ.

However, this is simply another way of saying that he has made a "substantial showing of the denial of a constitutional right" - an argument that goes to whether a COA should have been issued in the first place. In sum, there is no basis for considering uncertified issues and we shall not do so.

III

Turning to the certified issues, Valerio argues that the district court erred in upholding his sentence of death given that the jury relied on an unconstitutionally vague aggravator. The jury found one mitigating factor (that Valerio was gainfully employed at the time) and two aggravating circumstances: that Valerio had a prior felony conviction involving violence and that the murder involved "torture, depravity of mind, or mutilation of the victim." The jury was not instructed on the definition of "torture" or "mutilation," but "depravity of mind" was defined as follows:

> The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent

> to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

There is no questions that this depravity of mind instruction fails to satisfy the requirements of *Godfrey v. Georgia*, 446 U.S. 420 (1980). *See McKenna v. McDaniel*, 65 F.3d 1483, 1489 (9th Cir. 1995) (recognizing unconstitutionality of Nevada's depravity of mind instruction). The federal district court recognized this, but found in accordance with *Lewis v. Jeffers*, 497 U.S. 764 (1990), *Walton v. Arizona*, 497 U.S. 639 (1990), and *Maynard v. Cartwright*, 486 U.S. 356 (1988) that the Nevada Supreme Court cured the deficiency on post-conviction review by applying a narrow construction that required some form of torture or serious physical abuse.[33]

---

[33] Valerio did not raise the depravity of mind issue on direct appeal, which was decided by the Nevada Supreme Court on September 6, 1989. By way of background, we first determined that the Nevada depravity instruction was unconstitutional in *Deutscher v. Whitley*, 884 F.2d 1152 (9th Cir. 1989), *vacated on other grounds Angelone v. Deutscher*, 500 U.S. 901 (1991). Our opinion was rendered August 31, 1989. Before this, the Nevada Supreme Court responded to *Godfrey* in *Rogers v. Nevada*, 705 P.2d 664, 671-72 (Nev. 1985), by recognizing the need to apply a saving interpretation of the "depravity of mind" instruction and finding the existence of facts evidencing torture (which was defined for the jury) in addition to "depravity of mind" sufficient. Then, in *Robins v. Nevada*, 798 P.2d 558, 570 (Nev. 1990), the Nevada Supreme Court stated that the depravity of mind instruction must include "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to [the] aggravating circumstance."

Valerio's first state post-conviction proceeding raised the

In *Maynard*, the United States Supreme Court held that Oklahoma's aggravating circumstance of "especially heinous, atrocious, or cruel" was unconstitutionally vague under *Godfrey*, but that it would pass muster if limited to murders involving "some kind of torture or serious physical abuse." 486 U.S. at 364-65. In *Lewis*, the Court confirmed that

> if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement" of "channeling and limiting...the sentencer's discretion in imposing the death penalty," has been satisfied.

497 U.S. at 779 (citation omitted).

Valerio acknowledges that under this line of

---

issue. The trial court analyzed the issue in light of *Godfrey*, *Deutscher*, and *Robins*, and determined that the death sentence was not solely based on a "depravity of mind" aspect since it involved the torture of the deceased. The Nevada Supreme Court agreed on appeal, in an order filed January 24, 1992, that "the murder of Karen Blackwell involved torture (or serious physical abuse)." Construing the depravity of mind instruction as it had prescribed in *Robins* - to require torture or other serious and depraved physical abuse beyond the act of killing itself - the court found the evidence sufficient to show that the victim was subjected to torture and/or serious physical abuse before she died as she was stabbed more than forty-five times, had defensive wounds on her hands and arms, and did not die from one wound. Accordingly, it concluded that the depravity of mind instruction was not unconstitutionally vague "as applied."

authority a vague aggravating circumstance may survive a constitutional challenge where a sufficiently narrow construction is adopted and applied by a state appellate court, but contends that the state courts did not cure the unconstitutional impact of the vague aggravator in his case. First, he asserts that there was insufficient evidence of torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself to avoid the unconstitutional application of the vague aggravator. Second, he argues that the state supreme court and the federal district court failed to apply the narrowing construction to the aggravator and it remains unconstitutionally vague. Further, he submits that the aggravator remains unconstitutionally vague on its face because the Nevada Supreme Court has inconsistently applied its limiting construction. Finally, he claims that the state supreme court lacked the authority to make the findings necessary to uphold the aggravator or the sentence of death upon which it was based.

Bayer urges us to consider only the first argument, contending the others are asserted for the first time on this

appeal. Valerio counters by pointing to his Reply to the State's Response to the habeas petition and to his application for a COA. We must disregard whatever was argued in the request for a COA because this comes too late for the parties to develop a record and the district court to have an opportunity to rule on the issue. *See Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1319 (9th Cir. 1998). Beyond this, in his Reply to the State's Response, Valerio claimed that it was improper for the state appellate court to reexamine the evidence supporting an aggravating circumstance when the jury did not have the appropriate definition presented to it, and that the Nevada Supreme Court did not correctly apply its own limiting construction. Arguably this is sufficient to preserve these points. However, we find nothing in the record to show that Valerio argued that the aggravator remains unconstitutionally vague, so it is clearly waived.[34]

---

[34] In any event, Valerio's arguments fail. He contends that the aggravator (as limited) remains unconstitutionally vague because the Nevada Supreme Court has not consistently interpreted it. He faults the court for failing to define "serious and depraved physical abuse beyond the act of killing itself" or to adhere to a single or consistent definition of "torture," asking this court to examine the evidence of torture in other Nevada cases. Valerio also maintains that the Nevada Supreme Court consistently fails to require sufficient proof of intent.

A

Valerio's sufficiency argument turns on his view that repeated blows do not reflect an intent to torture or to inflict serious physical abuse, rather than panic or frenzy. We review the Nevada Supreme Court's application of the narrowing construction under the "rational factfinder" standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Lewis*, 497 U.S. at 783 (establishing rule). Thus, we will affirm unless no reasonable sentencer could have found the aggravating circumstance. Given the evidence of how and where Valerio stabbed Blackwell, the Nevada Supreme Court's finding that she was subjected to "torture and/or serious physical abuse" before she died is one a rational factfinder could have made.

B

Valerio argues that the Nevada Supreme Court (as well as the federal district court) failed to apply the limiting

---

However, essentially the same challenge was made in *Walton* and *Lewis*, and rejected. Whether the Nevada Supreme Court's application of its narrowing construction to the facts of this case is consistent with its application in other cases "reduces, in essence, to a claim that the state court simply misapplied its own aggravating circumstance to the facts of [t]his case." *Lewis*, 497 U.S. at 780. For this there is no federal habeas corpus remedy. Id.

construction as defined in *Robins*. He posits that there could be no plausible finding that there was physical abuse "beyond the act of killing itself" because the victim did not die from one wound but all wounds combined. Valerio also suggests it is significant that the state supreme court ignored the "depraved" aspect of its limiting construction by finding the limiting construction was met despite no evidence of his mental state. The difficulty is that "federal habeas corpus relief does not lie for errors of state law." *Lewis*, 497 U.S. at 780. We understand Valerio's argument to be that the Nevada Supreme Court misapplied its own aggravating circumstance. But, if the state court has adopted a "constitutionally narrow construction of a facially vague aggravating circumstance, and...has applied that construction to the facts of the particular case," the constitutional requirement is satisfied. *Id.* at 779. As we have already explained, a rational factfinder could have found torture and/or serious physical abuse beyond the act of killing itself before Blackwell died. An aggravator, so limited, is constitutionally sufficient, *see Maynard*, 486 U.S. at 365, and we have no license to go further on federal

habeas review.

C

Valerio submits that the Nevada Supreme Court lacked the authority to cure the vague aggravator and that he must be accorded a resentencing proceeding before the trial court. While Valerio acknowledges that a state appellate court may provide a limiting construction sufficient to save the application of an otherwise vague aggravator, he contends that the Nevada Supreme Court could not have done so constitutionally in his case because the state supreme court was required to make findings of fact to effectuate its limiting construction but is prohibited from doing so by state statute and the state Constitution. To the extent the Nevada Supreme Court acted as fact-finder, Valerio suggests that it misinterpreted *Clemons* as providing authority to reweigh circumstances or to conduct a harmless error review that the court lacks under state law. In Valerio's view, this runs afoul of the Fourteenth Amendment's due process clause; relying on *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993), he reasons that due process protects the

rights of defendants to a determination of sentence at the trial level because the power to find facts--which includes aggravating circumstances--is a power that state law denies the Nevada Supreme Court. Valerio also asserts that he has the right to a redetermination of his sentence at the trial level due to the invalidity of the depravity of mind aggravating circumstance. He argues that because one of the aggravating factors found by the jury is unconstitutional, the question becomes whether the mitigating evidence is sufficient to outweigh the sole remaining aggravating factor and he must, therefore, be resentenced in a proceeding where the remaining valid aggravating factor is weighed against the mitigating evidence by a jury. The bottom line, as Valerio puts it, is that the state supreme court was and is without authority to conduct such a proceeding and he must be accorded a new sentencing proceeding at the state trial level.

We cannot agree that a new sentencing proceeding at the trial level is required for the reasons asserted. It is clear that there is no constitutional right to jury sentencing, even in a capital case, *Cabana v. Bullock*, 474 U.S. 376, 385-86

(1986), and that a state appellate court may make the necessary findings. *Lewis*, 497 U.S. at 783. Nothing that Valerio points to in Nevada law suggests otherwise. The Nevada Supreme Court has routinely determined whether substantial evidence supports a finding of an aggravating circumstance, as properly limited by that court's construction, *see, e.g., Moran v. Nevada*, 734 P.2d 712, 714-15, (Nev. 1987); *Deutscher v. Nevada*, 601 P.2d 407, 418 (Nev. 1979), and has explicitly held that a *Clemons* review does not require it to make impermissible findings of fact under Article 6, Section 4 of the Nevada Constitution or NRS 177.025, the state law provisions upon which Valerio relies. *See Canape v. Nevada*, 859 P.2d 1023, 1034 (Nev. 1993). Thus, *Hicks* is not implicated, nor is *Rust*. In *Rust*, the Nebraska Supreme Court found that the existence of each aggravating factor in Rust's case was proven beyond reasonable doubt although it had just created that standard. In these circumstances the Eighth Circuit concluded that the proceedings in the Nebraska Supreme Court were essentially an unreviewable resentencing in violation of Rust's due process rights instead of merely a permissible

appellate "cure" of deficiencies in the sentencing proceedings. *Rust*, 984 F.2d at 1493. Unlike *Rust*, in this case the state supreme court did not apply a proper standard of proof for the first time, but applied a curative construction of the depravity of mind aggravator found by the jury and determined that as cured, it was supported by substantial evidence.

Valerio's reliance on *Stromberg v. California*, 283 U.S. 359, 368 (1931), and its progeny fares no better because there was no reliance here on alternative theories for conviction. As permitted by *Clemons* and *Walton*, the Nevada Supreme Court determined "whether the evidence supports the existence of the aggravating circumstance as properly defined." *Walton*, 497 U.S. at 654. This distinguishes Valerio's case from *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995), where the Nevada Supreme Court held that any error in the depravity of mind instruction was harmless but did not determine, as it did here, that the circumstances of the murder involved torture or serious physical abuse, *i.e.*, "the aggravating circumstance as properly defined."

AFFIRMED.

APPENDIX I

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. ROBERT BAYER, Director of the Department of Prison; E.K. McDANIEL, Warden, Respondents-Appellees.	No. 98-99033 DC No. CV-N-96-00362-HDM ORDER

Filed June 12, 2001

BEFORE: SCHROEDER, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel memorandum disposition shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

APPENDIX J

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. ROBERT BAYER, ET AL., Respondent-Appellee.	No. 98-99033 D.C. No. CV-N-96-362-HDM ORDER

Filed July 13, 2001.

BEFORE: SCHROEDER, Chief Judge.

The en banc court requests supplemental briefing from both parties regarding the following issues:

(1) Does the Nevada Supreme Court's finding of procedureal default for the majority of Valerio's claims rely on "independent and adequate state grounds," in light of *Calderon v. U.S. District Ct. (Bean)*, 96 F.3d 1126, 1131 (9th Cir. 1996)?

(2) Does the Nevada Supreme Court's finding of procedural default constitute an "independent and adequate state ground" given the Ninth Circuit's holdings in *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995); *Moran*

v. McDaniel, 80 F.3d 1261 (9th Cir. 1996); *Bargas v. Burns*, 179 F.3d 1207 (9th Cir. 1999); *see also Petrocelli v. Angelone*, 248 F.3d 887 (9th Cir. 2001)?

Supplemental briefing shall be submitted within 28 days from the date of this order and shall not exceed 15 pages in length.

Amicus Curiae Federal Public Defender may also submit a supplemental brief within the specified time period, but its brief shall not exceed 10 pages in length.

APPENDIX K

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. JACKIE CRAWFORD,[35] E.K. MCDANIEL, Warden, Respondents-Appellees.	No. 98-99033 D.C. No. CV-N-96-362- HDM ORDER

Filed September 19, 2001.

BEFORE: SCHROEDER, Chief Judge.

Appellant's requst to take judicial notice is denied.

The parties should be prepared to address the following issues at oral argument:

(1) Does Ninth Circuit rule 22-1(d) apply to appeals that were pending on the rule's effective date?

(2) If not, (A) Does the Nevada Supreme Court's finding of procedural default for the majority of Valerio's claims rely on "independent and adequate state grounds,"

[35] Pursuant to Fed. R. Civ. P.25(d)(1), Jackie Crawford is substituted for Robert Bayer as the current Director of the Nevada Department of Prisons.

in light of *Calderon v. U.S. District Ct. (Bean)*, 96 F.3d 1126, 1131(9th Cir. 1996)? (B) Does the Nevada Supreme Court's finding of procedural default constitute an "independent and adequate state ground" given the Ninth Circuit's holdings in *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995); *Moran v. McDaniel*, 80 F.3d 1261 (9th Cir. 1996); *Bargas v. Burns*, 179 F.3d 1207 (9th Cir. 1999); *see also Petrocelli v. Angelone*, 248 F.3d 887 (9th Cir. 2001)?

APPENDIX L

INDEX OF EXHIBITS TO THE APPELLANT'S REQUEST TO TAKE JUDICIAL NOTICE OF COURT RECORDS

VOLUME I

1. *Petrocelli v. Angelone*, United States Court of Appeals for the Ninth Circuit, case no. 97-99029, Amicus Curiae's Request to Take Judicial Notice of Court Records (November 16, 1998)

1. Draft Order Dismissing Mixed Petition, United States District Court for the District of Nevada
2. *Nevius v. Director, Nevada State Prison*, Nevada Supreme Court Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986)
3. *Deutscher v. Warden*, 102 Nev. 388, 724 P.2d 213 (September 4, 1986)
4. Hill v. State of Nevada, No. 18253, Order Dismissing Appeal (June 29, 1987)
5. Neuschafer v. Warden, No. 18371, Order Dismissing Appeal (August 19, 1987)
6. Williams v. State of Nevada, No. 19712, Order Dismissing Appeal (July 12, 1988)
7. Ybarra v. Director, Nevada State Prison, No. 19705, Order Dismissing Appeal (June 29, 1989)
8. Williams v. State of Nevada, No. 20732, Order Dismissing Appeal (July 18, 1990)
9. Farmer v. State of Nevada, No. 22562, Order Dismissing Appeal (February 20, 1992)
10. Gallego v. State of Nevada, No. 22758, Order Dismissing Appeal (July 21, 1992)
11. *Snow v. Director, Nevada State Prison*, No. 23873, Order Dismissing Appeal (March 19, 1993)
12. *Howard v. State of Nevada*, No. 23386, Order Dismissing Appeal (March 19, 1993)

13. *Hogan v. Warden*, 109 Nev. 952, 860 P.2d 710 (September 29, 1993), Rehearing Denied, 112 Nev. 553, 916 P.2d 805 (May 3, 1996)
14. *Rogers v. Warden*, No. 22858, Order Dismissing Appeal (May 28, 1993) and Amended Order Dismissal. Appeal (June 4, 1993)
15. *Petrocelli v. Warden*, No. 23065, Order Dismissing Appeal (December 22, 1993)
16. *Hardison v. State of Nevada*, No. 24195, Order of Remand (May 24, 1994)
17. *Stevens v. State of Nevada*, No. 24138, Order of Remand (July 8, 1994)
18. *Ford v. Warden*, 111 Nev. 872, 901 P.2d 123 (July 27, 1995)
19. *McKague v. Warden*, 112 Nev. 159, 912 P.2d 255 (February 29, 1996)
20. *Moran v. State of Nevada*, No. 28188, Order Dismissing Appeal (March 21, 1996)
21. *Valerio v. State of Nevada*, 112 Nev. 383, 915 P.2d 874 (April 30, 1996)
22. *Mazzan v. Warden*, 112 Nev. 838 921 P.2d 920 (July 22, 1996); and, Order Denying Rehearing (November 8, 1996)
23. *Milligan v. State of Nevada*, No. 25748, Order of Remand (July 23, 1996)
24. *Nevius v. Warden*, Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition for Writ of Habeas Corpus (October 9, 1996); and Order Denying Rehearing (July 17, 1998)
25. *Bejarano v. Warden*, 112 Nev. 1466, 929 P.2d 922 (December 20, 1996)
26. *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (February 26, 1997)
27. *Williams v. Warden*, No. 29084, Order Dismissing Appeal (August 29, 1997)
28. *Sechrest v. State*, No. 29170, Order Dismissing Appeal (November 20, 1997)
29. *Farmer v. State of Nevada*, No. 29120, Order Dismissing Appeal (November 20, 1997)
30. *Hill v. State*, 114 Nev. ___ 953 P.2d 1077 (February 26, 1998), and Order, (June 10, 1996)
31. *Wilson v. State of Nevada*, No. 29802, Order Dismissing Appeal (April 9, 1998)

32. *Cavanaugh v. McDaniel*, No. 31702, Order Dismissing Appeal(June 23, 1998)
33. *Adams v. Warden*, No. 30217, Order Dismissing Appeal (August 10, 1998)
34. **Chart 1:**
Untimely or successive capital post-conviction cases covered by *Crump* rule (that ineffective assistance of post-conviction counsel is excuse for default) in which Nevada Supreme Court actually applied *Crump* rule
Chart 2:
Untimely or successive capital post-conviction cases in which the Nevada Supreme Court addressed substantive constitutional issues addressed in connection with application of default rules.
Chart 3
Untimely or successive capital post-conviction cases in which the Nevada Supreme Court ignored the issue of default entirely.
Chart 4:
Untimely or successive capital post-conviction cases in which Nevada Supreme Court applied default rules without explicitly or implicitly basing its decision on the merits of the underlying federal constitutional claims.

2. *Petrocelli v. Angelone*, United States Court of Appeals for the Ninth Circuit, case no. 97-99029, Order Granting Amicus's Request to Take Judicial Notice of Court Records (March 29, 1999)

3. *Petrocelli v. Angelone*, United States Court of Appeals for the Ninth Circuit, case no. 97-99029, Letter to the Clerk of the Court of Appeals (March 2, 2000), with attached Briefing in *Hardison v. State*, no. 24195

VOLUME II

4. *Petrocelli v. Angelone*, United States Court of Appeals for the Ninth Circuit, case no. 97-99029, Motion for Certificate of Appealability (September 1, 2000)

5. *Petrocelli v. Angelone*, United States Court of Appeals for the Ninth Circuit, case no. 97-99029, Motion to Strike Petitioner-Appellant's Motion for Certificate of Appealability (September 28, 2000)

6. *Bejarano v. State*, Nevada Supreme Court Case No. 19023, Appellant's Opening Brief (August 29, 1988)

7. *Bejarano v. State*, Nevada Supreme Court Case No. 19023, Respondent's Answering Brief (October 20, 1988)

8. *Bejarano v. State*, Nevada Supreme Court Case No. 19023, Appellant's Reply Brief (November 16, 1988)

9. *Bejarano v. State*, Nevada Supreme Court Case No. 19023, Order Dismissing Appeal (December 22, 1988)

10. *Stevens v. State*, Eighth Judicial District Court Case No. C70597, Finding of Facts, Conclusions of Law and Order (April 27, 1992)

11. *Stevens v. State*, Nevada Supreme Court Case No. 24138, Appellant's Opening Brief (December 27, 1994)

12. *Stevens v. State*, Nevada Supreme Court Case No. 24138, Respondent's Answering Brief (February 3, 1994)

13. *Stevens v. State*, Nevada Supreme Court Case No. 24138, Motion to Remand Matter to District Court (March 22, 1994)

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,	No. 98-99033
Petitioner-Appellant, v.	D.C. No. CV-N-96-00362-HDM
ROBERT BAYER, Director of the Department of Prisons, E.K. McDANIEL, Warden,	**ORDER**
Respondents-Appellees.	

Filed October 09, 2001

Before: SCHROEDER, Chief Judge, REINHARDT, O'SCANNLAIN, RYMER, T.G. NELSON, THOMAS, GRABER, W. FLETCHER, FISHER, PAEZ, and BERZON, Circuit Judges

The prior order, filed September 19, 2001, denying Petitioner-Appellant Valerio's Request to Take Judicial Notice of Court Records, is hereby withdrawn.

Appellant's Request to Take Judicial Notice is hereby GRANTED.

The parties are invited to submit supplemental briefing addressing the legal significance of the materials of

which we are now taking judicial notice. Appellant Valerio may submit a brief, not to exceed twenty pages, within two weeks of receipt of this order. Respondents-Appellees Bayer, et al., may submit a brief in response, not to exceed twenty pages, within four weeks of receipt of this order. No reply brief shall be permitted without a separate order by this panel.

APPENDIX N

INDEX OF EXHIBITS TO THE APPELLANT'S SUPPLEMENTAL REQUEST TO TAKE JUDICIAL NOTICE OF COURT RECORDS

Exhibit 1 *Bejarano v. Hatcher*, 7th Judicial District Court Case No. HC-0361292, Order Dismissing Petition For Writ of Habeas Corpus (January 24, 1991)

Exhibit 2 *Bejarano v. Hatcher*, Nevada Supreme Court Case No. 25469, Appellant's Opening Brief (July 22, 1994)

Exhibit 3 *Bejarano v. Hatcher*, Nevada Supreme Court Case No. 25469, Respondent's Answering Brief (September 16, 1994)

Exhibit 4 *Neuschafer v. Sumner*, Nevada Supreme Court Case No. 16815, Order Dismissing Appeal (November 1, 1985)

Exhibit 5 *Wade v. State*, Nevada Supreme Court Case No. 37467, Order of Affirmance (October 11, 2001)

APPENDIX O

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,	No. 98-99033
Petitioner-Appellant, v.	D.C. No. CV-N-96-00362-HDM
	ORDER
ROBERT BAYER, Director of the Department of Prisons, E.K. McDANIEL, Warden,	
Respondents-Appellees.	

Filed January 9, 2002.

Before: SCHROEDER, Chief Judge, REINHARDT, O'SCANNLAIN, RYMER, T.G. NELSON, THOMAS, GRABER, W. FLETCHER, FISHER, PAEZ, and BERZON, Circuit Judges

Petitioner-Appellant's Supplemental Request to Take Judicial Notice, filed November 15, 2001, is hereby GRANTED.

Respondents-Appellees' motion to strike, filed December 21, 2001, is hereby DENIED.

APPENDIX P

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, *Petitioner-Appellant,* v. JACKIE CRAWFORD, Director of the Department of Prisons, E.K. McDANIEL, Warden, *Respondents-Appellees*	No. 98-99033 D.C. No. CV-N-96-00362-HDM OPINION

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Rehearing En Banc Granted June 12, 2001
Argued and Submitted En Banc
September 24, 2001—San Francisco, California

Filed September 17, 2002

Before: Mary M. Schroeder, Chief Judge, Stephen Reinhardt,
Diarmuid F. O'Scannlain, Pamela Ann Rymer,
Thomas G. Nelson, Sidney R. Thomas, Susan P. Graber,
William A. Fletcher, Raymond C. Fisher, Richard A. Paez,
and Marsha S. Berzon, Circuit Judges.

Opinion by Judge William A. Fletcher;
Concurrence by Judge Fisher;
Dissent by Judge Rymer
14063

COUNSEL

Lawrence D. Wishart, Mary Beth Gardner, Reno, Nevada, for the petitioner-appellant.

Frankie Sue Del Papa, David F. Sarnowski, Robert E. Wieland, Dorothy Nash Holmes, Office of the Attorney General, Las Vegas, Nevada, for the respondent-appellee.

Franny A. Forsman, Michael Pescetta, Office of the Federal Public Defender, Las Vegas, Nevada for the *Amicus Curiae*.

OPINION

W. FLETCHER, Circuit Judge:

In this capital case, petitioner John Espiredion Valerio appeals the district court's dismissal of his petition for writ of habeas corpus under 28 U.S.C. § 2254. We decide as follows:

First we reverse the district court's dismissal of Valerio's habeas petition as to the penalty phase of his trial. During the penalty phase the jury was instructed to determine whether the murder with which Valerio was charged "involved torture, depravity of mind, or mutilation of the victim." The jury concluded that this aggravating circumstance was present and, based in part on this conclusion, sentenced Valerio to death.

The jury instruction was clearly unconstitutional under *Godfrey v. Georgia*, 446 U.S. 420 (1980). On appeal from a denial of state post-conviction collateral relief, the Nevada Supreme Court sought to cure the error pursuant to the procedure endorsed in *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled in part by Ring v. Arizona*, 122 S. Ct. 2428 (2002), by applying a narrowing construction of the instruction to a *de novo* finding of the facts. We hold that the *Walton* procedure is not available when a jury rather than

the trial judge has found the facts and determined whether there were aggravating and mitigating circumstance. We also hold that, even if the *Walton* procedure were available, the Nevada Supreme Court failed to provide "close appellate scrutiny" and therefore failed to cure the instruction error. Evaluating the effect of the error under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), we hold the error not harmless. We therefore remand with instructions that, should the district court upon remand deny Valerio's claims as to the guilt phase of his trial, it shall grant the writ as to the penalty phase and shall provide any appropriate interim relief.

Second, we address the effective date of our Circuit Rule 22-1. The district court granted a certificate of appealability ("COA") on the issue of the unconstitutional aggravator, but it refused to grant a COA on issues in two groups of additional claims relating to the guilt phase. Valerio sought to expand the COA to encompass the issues in these additional claims by briefing them to us, as expressly permitted under our decision in *United States v. Cruz-Mendoza*, 147 F.3d 1069, 1074-75 (9th Cir. 1998) (*Cruz-Mendoza I*), *amended and superseded in part by United States v. Cruz-Mendoza*, 163 F.3d 1149 (9th Cir. 1998) (*Cruz-Mendoza II*). Our Circuit Rule 22-1 sets forth procedural requirements for appellants seeking to expand a partially-denied COA which Valerio did not, and could not, satisfy. We hold that because Rule 22-1 went into effect after the district court denied the COA as to these other issues, it does not apply to Valerio's request for an expanded COA. We therefore hold that Valerio's request for an expanded COA on the additional issues briefed is properly before us.

Third, we address the first group of additional guilt-phase claims. That group consists of three claims newly added to Valerio's amended federal habeas petition. The district court dismissed these claims for abuse of the writ under *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996). After the district court's decision, the Supreme Court reversed *Farmer* in *Slack v. McDaniel*, 529 U.S. 473 (2000). Based on *Slack*, we grant the expanded COA, reverse the dismissal of

these claims, and remand to the district court for appropriate action.

Fourth, we address the second group of additional guilt-phase claims. This group consists of claims that the district court declined to decide on the ground that they had been procedurally defaulted in state court. We hold that the claims were not procedurally defaulted. We grant the expanded COA, reverse the dismissal of these claims, and remand to the district court for appropriate consideration.

I. Background

In 1988, a Nevada jury convicted petitioner-appellant Valerio of first degree murder with the use of a deadly weapon for the killing of Karen Sue Blackwell. Valerio had killed Blackwell by stabbing her 45 times. During the separate penalty proceeding, the jury found two aggravating circumstances: first, that Valerio had a prior violent felony conviction and second, that the murder "involved torture, depravity of mind, or mutilation." The jury returned a verdict of death.

Valerio appealed his conviction, arguing that he was prejudiced by prosecutorial misconduct and by the introduction of certain photographs at trial. The Nevada Supreme Court denied his direct appeal in September 1989. Valerio then filed a petition for post-conviction relief in state court pursuant to Nevada Revised Statute (NRS) Chapter 177. The petition claimed, *inter alia*, ineffective assistance of counsel ("IAC") and unconstitutionality of a penalty phase aggravating circumstance jury instruction requiring a finding of "torture, depravity of mind, or mutilation of the victim." After conducting an evidentiary hearing, the Nevada district court denied Valerio's petition in November1990, rejecting all of his claims. The Nevada Supreme Court affirmed the denial in January 1992.

Valerio then filed a petition for habeas corpus in federal district court under 28 U.S.C. § 2254, alleging 18 claims for relief, some of which had not been exhausted in state court. Because the petition was "mixed," containing exhausted

and unexhausted claims, the district court dismissed it under *Rose v. Lundy*, 455 U.S. 509 (1982). In December 1992, Valerio filed a second state petition for post-conviction relief in Nevada district court, this time a petition for habeas corpus under NRS Chapter 34.[36] This petition alleged 24 claims for relief, including two claims based on ineffective assistance of counsel. The state district court dismissed the entire petition as procedurally barred under NRS 34.810. In April 1996, the Nevada Supreme Court affirmed the dismissal of Valerio's petition as procedurally barred. *See Valerio v. State*, 112 Nev. 383 (Nev. 1996).

In May 1996, Valerio filed a second petition for habeas corpus in federal district court. That petition, the focus of the present appeal, asserts the same 24 claims for relief that Valerio had presented to the Nevada state courts in his second state petition. As amended in December 1996, the petition also asserts three additional claims. Two claims assert further factual grounds supporting the claims of IAC. One claim asserts a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The federal district court dismissed most of Valerio's claims as procedurally defaulted in state court. The court then rejected the three newly added claims as an abuse of the writ under federal law. Finally, the court entered judgment denying Valerio's remaining claims on the merits and dismissed his petition on August 20, 1998. Valerio applied for a COA generally on all issues decided against him by the district court. He specifically applied for a COA on claim 13 (improper closing argument by the prosecutor in the penalty phase), claim 14 (unconstitutionally vague

---

[36]Between 1967 and 1993, there were two types of post-conviction relief available to petitioners in Nevada: one under NRS Chapter 177 (post-conviction relief), and one under NRS Chapter 34 (habeas corpus). *See Pellegrini v. State*, 117 Nev. ___, 34 P.3d 519, 526-28 (Nev. 2001) (per curiam) (explaining history of Nevada post-conviction remedies). As of January 1, 1993, the sole post-conviction remedy available to petitioners in Nevada is a petition for a writ of habeas corpus; the procedures for seeking the writ are codified in NRS Chapter 34. *See id.*

instruction on aggravating circumstance in the penalty phase), and claim 15 (insufficient evidence of torture and mutilation under the aggravating circumstance). On October 15, 1998, the district court granted the COA as to the issues in claims 13, 14, and 15 and denied certification as to all other issues.

Valerio appealed the district court's dismissal on the merits of claims 14 and 15.[37] He also sought to appeal the uncertified issues of whether the district court properly dismissed his other claims as procedurally defaulted or abusive. In an unpublished memorandum disposition, a three-judge panel of this court affirmed the district court's dismissal. The panel affirmed the district court's ruling on the merits of claims 14 and 15, concluding that the Nevada Supreme Court had cured any instructional error by applying a narrowing construction to the aggravating circumstance under *Walton*, 497 U.S. at 653-54. Relying on Ninth Circuit Rule 22-1, the panel refused to consider the other issues Valerio had sought to appeal, through an expanded COA, when he argued in his briefs that his other claims were neither procedurally defaulted nor abusive. We have taken Valerio's appeal en banc and have vacated the panel's decision.

II. Depravity of Mind Jury Instruction

We first address Valerio's penalty-phase claim that a jury instruction on an aggravating circumstance was unconstitutional. We address this claim even though, as will be seen later in the opinion, we remand several guilt-phase claims for further consideration. We have previously addressed penalty-phase claims while guilt-phase claims remain to be adjudicated. *See Morris v. Woodford*, 273 F.3d 826,828 (9th Cir. 2001) (granting writ with respect to death sentence while guilt-phase claims remain to be decided). We recognize that if one of Valerio's guilt phase claims is sustained (which, of course, is by no means certain), his entire conviction will be set aside, making it unnecessary to decide his penalty-phase claim. However, for two reasons,

---

[37] Vaerio did not pursue an appeal for claim 13.

we believe it is appropriate to address the penalty-phase claim now. First, the penalty-phase claim is before us and ready to be decided. The district court has decided it and granted a COA, the parties have briefed and argued it, and the claim is as ripe for decision as it will ever be. Second, even if it eventually turns out that Valerio's conviction is set aside, interim forms of relief short of release from incarceration, such as removal from death row, may be appropriate based on the fact that he will no longer be under sentence of death.

At the conclusion of the penalty phase of Valerio's trial, the jury was directed to determine whether the murder "involved torture, depravity of mind, or mutilation of the victim." Valerio argues that the "depravity of mind" portion of the instruction, and therefore the instruction as a whole, were unconstitutionally vague. The district court granted a COA on claim 14, concerning the unconstitutionality of the jury instruction. Valerio argues that the unconstitutionality of the instruction requires that we grant his petition as to the penalty phase of his trial. For the reasons that follow, we agree.[38]

A. Unconstitutionality of the Instruction

[1] It is clear that the aggravating-circumstance instruction concerning depravity of mind, in the form in which it was given to the jury, was unconstitutional. The Eighth Amendment requires that jury instructions in the penalty phase of a capital case sufficiently channel the jury's discretion to permit it to make a principled distinction

---

[38] Later in this opinion, we hold that the district court erred in dismissing three newly added claims for abuse of the writ. *See infra*, Part Iv. It is possible, though not certain, that none of these claims is exhausted. Because the district court had dismissed these three claims, the petition was not a mixed petition when the district court denied Valerio's claim that the aggravating circumstance jury instruction was unconstitutional. However, as a result of our reversal of the district court's dismissal of these claims, the petition has become mixed. We nonetheless believe that it is appropriate for us to rule on Valerio's appeal of the district court's decision on the merits of his exhausted jury instruction claim. *See* discussion *infra*, Part IV.

between the subset of murders for which a death sentence is appropriate and the majority of murders for which it is not. *See Wade v. Calderon*, 29 F.3d 1312, 1319 (9th Cir. 1994). When a jury is given an aggravating-circumstance instruction that would support the imposition of the death penalty, that instruction "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *see also Spaziano v. Florida*, 468 U.S. 447, 460 (1984) ("If a State has determined that death should be an available penalty for certain crimes, then it must administer than penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.").

In *Godfrey v. Georgia*, the Supreme Court held unconstitutional an aggravating-circumstance instruction that permitted a jury to impose the death penalty if it found that the murder "'was outrageously or wantonly vile, horrible or inhuman in that it involved torture, *depravity of mind*, or an aggravated battery to the victim.'" 446 U.S. at 428-29 (quoting state statute) (emphasis added). The instruction *Godfrey*, unconstrained by a narrowing construction, resulted in "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury." *Id.* at 429. *See also Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988) (holding unconstitutionally vague, under the reasoning of *Godfrey*, an aggravating-circumstances instruction directing jurors to determine whether the murder was "especially heinous, atrocious, and cruel").

[2] Applying *Godfrey*, we held in *Deutscher v. Whitley*, 884 F.2d 1152 (9th Cir. 1989), *vacated on other grounds sub nom. Angelone v. Deutscher*, 500 U.S. 901(1991), that the "depravity of mind" phrase in the Nevada jury instruction was unconstitutional. We held that the torture and mutilation parts of the instruction were "sufficiently clear and objective to satisfy the requirements of *Godfrey*," but

held that the depravity of mind part of the instruction was unconstitutionally vague.

> There is nothing in the definition of depravity of mind that restrains arbitrary imposition of the death penalty. The depravity instruction in this case ... is no more capable of channeling discretion than the 'especially heinous, atrocious, or cruel' instruction rejected in *Maynard* or the 'outrageously or wantonly vile, horrible or inhuman' instruction in *Godfrey*.

Id. at 1162 (citation omitted); *see also McKenna v. McDaniel*, 65 F.3d 1483, 1489 (9th Cir. 1995) (holding unconstitutionally vague a similar Nevada depravity of mind instruction).

Our decision in *Deutscher* was rendered on August 31, 1989. The Nevada Supreme Court decided Valerio's direct appeal from his conviction and sentence six days later, on September 6, 1989. It said nothing about *Godfrey* and *Deutscher*, and nothing about the constitutionality of the instruction.

The Nevada Supreme Court responded to *Godfrey* and *Deutscher* a year later, in *Robins v. State*, 106 Nev. 611 (Nev. 1990), by providing a narrowing construction to the depravity of mind aggravating circumstance instruction. It wrote in *Robins*: "[W]e construe the instruction and the statute (NRS 200.033(8)) upon which it is based as requiring *torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself*, as a qualifying requirement to an aggravating circumstance based in part upon depravity of mind." *Id.* at 629 (emphasis added).

B. State Court Proceedings

Nevada is a "weighing" state. *See McKenna*, 65 F.3d at 1489. In arriving at a penalty decision in a capital case, a Nevada jury is directed to weigh aggravating against mitigating circumstances. A Nevada jury may return a verdict of death for a death-eligible defendant "only if one

or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances." NRS 200.030(4)(a); *see also* NRS 175.554.

After the presentation of evidence at the penalty phase of Valerio's trial, the jury was instructed that it could find three possible aggravating circumstances. The constitutionality of the jury instruction as to two of them is not in question. The first was that "[t]he murder of Karen Sue Blackwell was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another." The second was that "[t]he murder was committed while the person was engaged in the commission of any robbery." The jury found the first of these two circumstances present, but not the second.

The third aggravating-circumstance instruction directed the jury to decide whether "[t]he murder of Karen Sue Blackwell by the defendant involved torture, *depravity of mind* or the mutilation of the victim" (emphasis added). Neither "torture" nor "mutilation of the victim" was defined in the instructions. "Depravity of mind" was defined as follows:

> The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

The prosecutor's argument concerning the third aggravating-circumstance instruction was, in its entirety:

The next aggravating circumstance which you would be able to find is that the murder, I'm not going to remember the exact wording, included or the person doing—let me get the instruction. I don't want to be wrong. The murder involved torture, depravity of mind or the mutilation of the victim. Did this killing involve any of those things?

> Let's just talk about depravity of mind. We all understand mutilation, disfigurement of the body. We all understand torture, systematic harming of someone while they're alive. Let's talk about depravity because that is defined for you since it's not a word often used. [The prosecutor then read the depravity of mind instruction.] It's pretty bad.
>
> We have a body here, the body of Karen Sue Blackwell, which had 45 knife wounds, three, I can't remember the number, some abrasions to the top of her head. This body was mutilated, was it not from the top of the head to the vaginal area. That body was mutilated, pure and simple. That must be the definition of mutilation.
>
> Did it happened [sic] during torture? We don't know that, although I will allude to the — you've probably looked at the pictures now and there is that thing that was called a tie wrap, I think, by one of the officers. It's a noose. That's what it is. Let's not call it a tie wrap any more. It's a noose. It was not used to choke. There's no evidence of that. Maybe a leash would be a better term. Maybe somebody put that around the neck of Karen Sue Blackwell not to drag it any place because there are no marks on the throat but to control. Does that

> start to hint of a depraved mind? All these things together, knife wounds in the front and the back, all over the arms, on the top of the head. This was a depraved, a depraved human being who did these acts.
>
> And I'm not going to argue to you that he tortured her because we don't know for sure that that's what happened, that he was doing it while she was awake and wanted her to suffer. But, but I think the evidence clearly shows depravity of mind and mutilation, and you only need one of those for another aggravating circumstance.

We may summarize the prosecutor's argument fairly simply. He disavowed reliance on the "torture" part of the instruction because, in his view, the evidence did not support it: "I'm not going to argue to you that he tortured her because we don't know for sure that that's what happened[.]" Instead, he relied on the two other parts of the instruction. He relied on "mutilation of the victim," emphasizing the 45 knife wounds and the "abrasions" on the top of the victim's head. And he relied on "depravity of mind," emphasizing the wounds and the "noose" or "leash" around the victim's neck.

The jury found that the murder "involved torture, depravity of mind or the mutilation of the victim." The jury found as a mitigating circumstance that at the time of the crime Valerio was gainfully employed and that his employer spoke well of his service. The jury found that the mitigating circumstance was insufficient to outweigh the two aggravating circumstances and imposed a sentence of death. Valerio appealed his conviction and death sentence directly to the Nevada Supreme Court.

Valerio "enumerated" only two errors in his direct appeal – first, that a photograph of the victim holding her daughter, as well as autopsy photographs, had been improperly admitted; and, second, that an argument by the prosecutor that Valerio should not be given "the opportunity to kill anyone again" was improper. The Nevada Supreme Court affirmed Valerio's conviction in an unpublished order. It held that the admission of the photograph of the victim with her daughter had been improper but not prejudicial, and that the admission of the autopsy photographs had been properly within the discretion of the trial court. It further held that the prosecutor's argument had been improper but not prejudicial.

In addition to any "errors enumerated" by a defendant sentenced to death, the Nevada Supreme Court is required by statute to address three issues *sua sponte* on direct appeal. The statute provides, in pertinent part:

> 2. Whether or not the defendant or his counsel affirmatively waives the appeal, the sentence must be reviewed on the record by the supreme court, which shall consider, in a single proceeding if an appeal is taken:
>
> (a) Any errors enumerated by way of appeal;
>
> (b) *Whether the evidence supports the finding of an aggravating circumstance or circumstances;*
>
> (c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and

> (d) Whether the sentence of death is excessive, considering both the crime and the defendant.

NRS 177.055(2) (emphasis added).

In affirming Valerio's conviction, the Nevada Supreme Court addressed only the two issues listed in NRS 177.055(2)(c) and (d). As to those two issues, it wrote:

> [O]ur review of the record reveals that Valerio's sentence was not imposed under the influence of passion, prejudice or any arbitrary factor, and that the sentence of death pronounced by the jury does not constitute excessive punishment, given the magnitude and circumstances of the crime.

The court did not address the issue it was required to consider under NRS 177.055(2)(b)—whether the evidence supported the jury's finding of the two aggravating circumstances.

In affirming Valerio's conviction and sentence, the Nevada Supreme Court did not mention the United States Supreme Court's decision in *Godfrey*, rendered eight years earlier, which had made clear that a depravity of mind aggravating-circumstance instruction was unconstitutionally vague. The court also did not mention our decision in *Deutscher*, rendered only six days earlier, which had specifically applied *Godfrey* to the Nevada depravity of mind instruction.

After his conviction and sentence were affirmed on direct appeal, Valerio petitioned for post-conviction collateral review in state court under NRS Chapter 177. Valerio contended in his petition, *inter alia*, that the

depravity of mind instruction was unconstitutionally vague. The state district court noted that Valerio had not raised the unconstitutionality of the instruction on direct appeal, but it nonetheless addressed (and rejected) the argument on the merits.[39] It wrote:

> The argument that the aggravating circumstance "depravity of mind" is unconstitutional and renders the petitioner's death penalty invalid was not raised on direct appeal. However, the Supreme Court has declared the term "depravity of mind" as being language that is "plain and intelligible" and not constitutionally vague. *Rogers v. State*, 101 Nev. 457, 467, 702 P.2d 664 (1985). See also: *Deutscher v. State*, 95 Nev. 669, 687, 601 P.2d 402 (1979) and *McKenna v. State*, 101 Nev. 338, 351, 601 P.2d 614 (1985). The Supreme Court recently reaffirmed the depravity of mind instruction in *Robins v. State*, Nev. Adv. Op. 108, filed September 19, 1990, wherein it distinguished the case from *Godfrey v. Georgia*, 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980).
>
> The death sentence is not solely based upon a "depravity of mind" aspect. This case involved

---

[39] The words chosen by the state district court make clear that it addressed defendant's argument on the merits, rather than addressed in an advisory fashion an argument it considered waived. It noted that the argument "was not raised on direct appeal," and then went on to discuss the argument and reject it on the merits. It never stated that it was treating the argument as waived. By contrast, the district court explicitly treated petitioner's next argument as waived. In the paragraph immediately following its discussion of the constitutionality of the aggravating circumstance, it wrote, "Petitioner's contention that he had not been formally convicted of the offense against Angela Howell was not raised on the direct appeal *and is considered waived.* NRS 177.375" (emphasis added).

> torture of the deceased. The petitioner stabbed the victim 45 times with the intent to cause cruel pain and suffering for some sadistic purpose and such acts involved a high probability of death. *Deutscher v. State*, 95 Nev. 669, 601 P.2d 407 (1979).

The Nevada district court thus provided two responses to Valerio's argument. First, as to the depravity of mind instruction, the court held that it was not unconstitutionally vague. The court wrote that the Nevada Supreme Court had "declared the term 'depravity of mind' as being ... not constitutionally vague" in *Rogers v. State* in 1985, and that it had "recently reaffirmed the depravity of mind instruction" in *Robins v. State* in 1990. In fact, however, the Nevada Supreme Court had not "reaffirmed" the constitutionality of the instruction in *Robins*. Rather, it had done just the opposite; based on *Godfrey*, it had held the instruction unconstitutional and had provided a new, narrowed construction. The state district court neither described the narrowed construction provided in *Robins*, nor tried to evaluate the evidence under that narrowed construction. The court did not mention our decision in *Deutscher* holding that the Nevada depravity of mind instruction was unconstitutional; instead, it cited only an earlier state court decision in that case.

Second, the state district court held that there was, in any event, torture within the meaning of the instruction. It did not mention the fact that the prosecutor, in his closing argument to the jury, had specifically stated that the evidence did not show torture. It did not discuss the fact that there was no evidence of torture beyond the wounds themselves. And it did not mention the fact that there was no evidence of the killer's "intent" or "sadistic purpose" beyond the nature of the wounds.

Valerio appealed the state district court's denial of his postconviction petition to the Nevada Supreme Court. In an unpublished order, that court rejected on the merits Valerio's argument that the depravity of mind instruction was unconstitutional.[40] It wrote in a footnote:

> [Valerio] contends that the jury was improperly instructed. We agree with the district court that the murder of Karen Blackwell involved torture (or serious physical abuse). In *Robins v. State*, 106 Nev. 611, 629, 798 P.2d 558, 570 (1990), we recognized that a depravity of mind instruction must include "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to [the] aggravating circumstance." In this case, evidence that Ms. Blackwell was stabbed more than forty-five times, had "defensive wounds" on her hands and arms, and died not from one wound but from all wounds combined, satisfies us that she was subjected to torture and/or serious physical abuse before she died. As in *Robins*, we thus conclude that the depravity of mind instruction in Mr. Valerio's case was not unconstitutionally vague as applied.

The Nevada Supreme Court's response to Valerio's argument may be summarized as follows: It first "agreed" with the state district court that the murder "involved

---

[40] Because the Nevada Supreme Court rejected Valerio's claim on the merits, there is no obstacle to our reviewing it on habeas corpus. "If a state appellate court overlooks the procedural default and considers an objection on the merits, the state has not relied on the procedural bar and the federal courts may review the claim." *Thomas v. Hubbard*, 273 F.3d 1164, 1176 (9th Cir. 2002), *overruled on other grounds by Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002) (en banc).

torture (or serious physical abuse)," even though the state district court had held only that the murder involved torture. Then, unlike the state district court, it discussed, and relied on, the narrowed construction of the instruction supplied in *Robins*. Finally, it held that the evidence in the case "satisfies us" that there had been "torture and/or serious physical abuse" before the victim's death. Like the state district court, the Nevada Supreme Court did not mention that the prosecutor had disavowed any conclusion that there had been torture, or discuss the evidence (or lack thereof) supporting a conclusion that Valerio intended to torture the victim.

C. Failure of the Nevada Supreme Court to Cure the Erroneous Jury Instruction

[3] Because the depravity of mind aggravating circumstance instruction, as given to Valerio's jury, was unconstitutionally vague under *Godfrey*, *see* 446 U.S. at 427-30; *see also Deutscher*, 884 F.2d at 1162-63; *McKenna*, 65 F.3d at 1489, the use of that instruction at Valerio's sentencing was contrary to clearly established law as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted ... unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.").

When a state trial court sentences a defendant to death based in part on an unconstitutionally vague aggravating circumstance, the state appellate court may affirm the sentence in three ways. First, it can find the error harmless under *Chapman v. California*, 386 U.S. 18, 24 (1967). Under *Chapman*, the state appellate court can affirm if it finds

beyond a reasonable doubt that the same result would have been obtained without relying on the unconstitutional aggravating circumstance. *See Clemons v. Mississippi*, 494 U.S. 738, 752-53 (1990) (approving *Chapman* harmless error analysis as method for curing unconstitutional jury instruction).

[4] Second, a state appellate court can cure the error by the method approved in two cases decided the same day, *Walton v. Arizona*, 497 U.S. 639 (1990), and *Lewis v. Jeffers*, 497 U.S. 764 (1990). (For ease of discussion, we refer to this method as a *Walton* analysis.) In a *Walton* analysis, a state appellate court provides a narrowed construction of the unconstitutional aggravating circumstance, and then itself performs a *de novo* evaluation of the evidence to determine if the aggravating circumstance exists.[41] As the Court wrote in *Walton*, "a state appellate court may itself determine whether the evidence supports the existence of

---

[41] In *Ring v. Arizona*, 122 S.Ct. 2428, 2432 (2002), the Supreme Court held, on direct review of the Arizona Supreme Court, that "[c]apital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment," thereby invalidating the Arizona practice under which the trial judge acted as a factfinder to determine the existence of aggravating and mitigating circumstances at the penalty phase. The Court wrote that it overruled *Walton* "in relevant part." *Id.* The only question directly before the Court in *Ring* was whether a state trial judge may find aggravating and mitigating circumstances. The related question of whether a state appellate court may cure an unconstitutional jury instruction by finding an aggravating circumstance was not directly before the Court. Although it appears to us inescapable that this aspect of *Walton* is invalid under the rationale of *Ring*, we do not assume, for purposes of our analysis, that it has been overruled.

We also do not reach the question of whether, if *Ring* overrules appellate court factfinding under *Walton*, that ruling is applicable on federal habeas corpus as a "watershed rule[]of criminal procedure" that "implicate[s] the fundamental fairness of the trial." *Teague v. Lane*, 489 U.S. 288, 311, 312 (1989); 28 U.S.C. § 2254(d)(1).

the aggravating circumstance as properly defined." 497 U.S. at 654. As it elaborated in *Jeffers*, "a state court's finding of an aggravating circumstance in a particular case" is "a *de novo* finding by an appellate court" that the fact of the aggravating circumstance exists. 497 U.S. at 783.

In performing a *Walton* analysis, the state appellate court is not reviewing a lower court finding for correctness; it is, instead, acting as a primary factfinder. A *Walton* analysis is available not only when the trial judge knows, or is presumed to know, the narrowing construction. *See Walton*, 497 U.S. at 653. It is also available when the "trial judge fails to apply the narrowing construction or applies an improper construction." *Id.* at 653-54. The Supreme Court has applied a *Walton* analysis only in *Walton* and *Jeffers*. In both of these cases, the penalty-phase factfinder at trial was a judge. The Supreme Court has never applied, or approved, a *Walton* analysis where the factfinder was a jury.

Third, a state appellate court can cure a penalty-phase instructional error by "reweighing" aggravating and mitigating circumstances under *Clemons*, 494 U.S. at 748. If the appellate court does not use a *Walton* analysis to find the existence of an aggravating circumstance that had been found at trial under an erroneous standard, that aggravating circumstance cannot be relied upon, in any respect, to affirm a death sentence. But under *Clemons*, a state appellate court may nonetheless affirm the death sentence by disregarding the aggravating circumstance found under an invalid instruction, and then reweighing the remaining valid aggravating and mitigating circumstances.

Reweighing under *Clemons* differs significantly from a *Walton* analysis. Under *Clemons*, the state appellate court reweighs aggravating and mitigating circumstances that

have already been found by a jury to exist. The appellate court does no independent factfinding, but rather relies on facts already found by the jury. That is, under *Clemons*, the appellate court evaluates and "reweighs" the aggravating and mitigating circumstances, but it does not independently determine whether those circumstances exist. Under *Walton*, by contrast, the appellate court applies a narrowing construction and then does its own independent *de novo* factfinding to determine whether the evidence supports the existence of one or more aggravating circumstances under the narrowed construction. Further, a *Clemons* reweighing is performed when the penalty-phase factfinder was a jury. *See Clemons*, 494 U.S. at 745 ("Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravated circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence."). Under *Walton*, by contrast, appellate court factfinding is done only when the factfinder was a judge.[42]

In reviewing the state district court's denial of Valerio's post-conviction petition, the Nevada Supreme Court in this case did not perform a harmless-error analysis under *Chapman*. Nor did it reweigh under *Clemons*. Rather, it affirmed the sentence by applying a narrowed construction and engaging in *de novo* factfinding under *Walton*. We must decide whether the Nevada Supreme

---

[42] Because the dissenting opinion does not recognize the distinction the Supreme Court has drawn between state appellate court factfinding under *Walton* and reweighing under *Clemons*, it erroneously concludes that the Supreme Court has approved appellate court factfinding under *Walton* when the trial court factfinder was a jury. The dissent cites no case in which the Supreme Court has approved a *Walton* analysis when the factfinder was a jury.

Court thereby succeeded in curing the unconstitutionally vague jury instruction. For two independently sufficient reasons, we conclude that it did not.

1. *Walton* Appellate Factfinding is Not Available When the Penalty-Phase Factfinder was a Jury

[5] The Supreme Court has approved *Walton* appellate court factfinding only in cases in which the factfinder during the penalty-phase trial was a judge. *See Walton; see also Lewis v. Jeffers*, 497 U.S. 764 (1990). The Court has never applied *Walton* to cases in which the fact finders were juries. Indeed, the Court explicitly stated in *Walton* that its reasoning did not apply to jury cases. The petitioner-defendant in *Walton* had argued under the reasoning of *Maynard v. Cartwright* and *Godfrey v. Georgia* that the unconstitutionally vague aggravating circumstance applied by the trial judge in his case required that the death sentence be vacated. In both *Maynard* and *Godfrey*, the Supreme Court had reversed death sentences outright because of unconstitutionally vague aggravating circumstances contained in jury instructions. However, the Supreme Court in *Walton* found *Maynard* and *Godfrey* not controlling because the death sentences in those cases had been imposed by juries. It wrote:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey. *But the logic of those cases has no place in the context of sentencing by a trial judge.*

Walton, 497 U.S. at 653 (emphasis added).

The Nevada Supreme Court itself now agrees that the *Walton* appellate factfinding procedure is not available when the penalty-phase factfinder was a jury. In Valerio's case, the Nevada Supreme Court applied a *Walton* analysis (although without invoking *Walton* by name) to apply the narrowing construction supplied by *Robins* and to find the facts *de novo*. But in a later case, *Pertgen v. State*, 110 Nev. 554 (Nev. 1994) (per curiam), *abrogated in part on other grounds by Pellegrini v. State*, 117 Nev. 34 P. 3d 519 (Nev. 2001), the Nevada Supreme Court held that the *Walton* procedure could not be applied in Nevada because juries are the penalty phase factfinders in that state. It wrote:

> Although the Court [in *Walton*] upheld the imposition of the death penalty, *Walton* is factually distinguishable from the present case. In *Walton*, the death sentence was imposed by a trial judge, who is presumed to know the law and to apply it in a constitutional manner. By contrast, in this case, the death sentence was imposed by a jury.

Id. at 562-63.

[6] We agree with the Nevada Supreme Court's holding in *Pertgen*. *Walton* does not allow a state appellate court to apply a narrowing construction to an unconstitutional instruction, and to engage in *de novo* factfinding, when the penalty-phase factfinder has been a jury. We therefore conclude that the Nevada Supreme Court's *de novo* factfinding under *Walton* did not—because it could not—cure the error caused by the unconstitutionally vague jury instruction.

2. The Nevada Supreme Court Did Not Provide

"Close Appellate Scrutiny"

[7] Even if we assume that *Walton* could have been used to cure an unconstitutionally vague aggravating-circumstance jury instruction, the Nevada Supreme Court did not fulfill its responsibilities under *Walton*. The Supreme Court has emphasized that a state appellate court must engage in "close appellate scrutiny" when affirming a death verdict where an unconstitutionally vague aggravating circumstance was applied at trial, and the Nevada Supreme Court did not provide such scrutiny.

A state appellate court cannot "affirm a district court without a thorough analysis of the role an invalid aggravating factor played in the sentencing process." *Stringer v. Black*, 503 U.S. 222, 230 (1992). In *Clemons v. Mississippi* the Supreme Court could not be sure that the state Supreme Court had performed a proper reweighing or had conducted an appropriate harmless-error analysis, and it refused to accept that court's "cryptic holding." 494 U.S. at 753. In *Sochor v. Florida*, 504 U.S. 527, 540 (1992), the Supreme Court noted that while it did not require a "particular formulaic indication" that the state appellate court had performed constitutional harmless error analysis, it could not accept "allusions by citation" that stopped "far short of clarity." According to the Supreme Court in *Stringer*, "[w]e require *close appellate scrutiny* of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." 503 U.S. at 230 (citing cases) (emphasis added); *see also Jeffers v. Lewis*, 38 F.3d 411, 414 (9th Cir. 1994) (en banc) ("*Close state appellate scrutiny* is required.") (emphasis added).

We therefore examine the decision of the Nevada Supreme Court in this case to determine whether it gave

the required "close appellate scrutiny" to the "import and effect of [the] invalid aggravating factor" in this case. *Stringer*, 503 U.S. at 230; *Jeffers*, 38 F.3d at 414. In the context of this case, we must determine whether the Nevada Supreme Court actually performed the analysis contemplated by *Walton*. That analysis requires two steps. First, the state appellate court must provide a constitutionally adequate narrowing construction to the unconstitutionally vague aggravating circumstance. Second, the appellate court must make an independent, *de novo* determination of whether the evidence introduced at trial proves the existence of the narrowed aggravating circumstance. *See Walton*, 497 U.S. at 645-46, 654.

The Nevada Supreme Court performed the first step in *Robins*, by construing the depravity of mind instruction to require "torture, mutilation, or other serious and depraved physical abuse beyond the act of killing itself." The Nevada Supreme Court then purported to perform the second step when it applied that narrowed construction to Valerio's case. *See* order, quoted *supra*, p. 18. However, it is apparent from its order that the Nevada Supreme Court did not properly perform the second step of its *Walton* analysis. The court recited accurately the narrowing *Robins* construction. But it is clear from the face of the order that the court's evaluation of the evidence under the narrowed instruction did not meet the United States Supreme Court's standard of "close appellate scrutiny."

First, the Nevada Supreme Court stated that it "agree[d]" with the state district court that the murder involved "torture (*or* serious physical abuse)" and that it was "satisfied" that the evidence showed that there was "torture *and/or* physical abuse" (emphases added). We conclude, from the use of the word "or" and the phrase "and/or," that the Nevada Supreme Court may have meant to do no more than to agree with the district court's

finding of torture. Agreement with the state district court on torture was a clearly insufficient basis upon which to affirm the conviction. *Robins* had narrowed the definition of "torture" by adding the qualification that any torture had to be "beyond the act of killing itself." However, the district court had not applied that limiting language in finding that there had been torture; rather, it had mischaracterized *Robins* as "reaffirming" the constitutionality of the depravity of mind instruction as it had been given. (Although it is not strictly relevant to our analysis, we also note that the prosecutor conceded in his closing argument to the jury that there had *not* been torture. Thus, it is less than clear that the evidence supported a finding of torture, even in the unqualified sense of the word.)

Second, the Nevada Supreme Court's phrase "serious physical abuse" is taken from the longer formulation in *Robins* ("serious and depraved physical abuse beyond the act of killing itself"). The state district court had not found serious physical abuse. Indeed, it had not mentioned physical abuse, serious or otherwise. Because the state district court had made no such finding, there was nothing in that court's order with respect to "serious physical abuse" with which the Nevada Supreme Court could have agreed.

Third, the Nevada Supreme Court stated that, as it viewed the evidence, the victim "died not from one wound but from all the wounds combined." This view of the evidence is inconsistent with the court's application of the narrowed version of the instruction that it was purporting to apply. As noted above, *Robins* requires that there be "serious and depraved physical abuse *beyond the act of killing itself* " (emphasis added). If, as the Nevada Supreme Court believed, the victim died from all the

wounds combined, the wounds did not constitute abuse beyond the act of killing itself.

We therefore conclude that the Nevada Supreme Court did not engage in the "close appellate scrutiny" required by *Stringer* and *Jeffers*, and that its analysis under *Walton* did not cure the erroneous jury instruction, even if it could have done so.

D. Harmless Error

Based on the foregoing, we know that the depravity of mind aggravating-circumstance jury instruction was unconstitutionally vague, and that the Nevada Supreme Court did not cure the instructional error. We must therefore determine whether the error was harmless.

1. Harmless Error Analysis When a *Walton* Analysis is Unavailable

We have held that state appellate court factfinding under *Walton* is not available in this case because the aggravating and mitigating circumstances were found by a jury rather than a judge. Because the instructional error was not cured (and was not curable) under *Walton*, it is possible that the use of the unconstitutionally vague "depravity of mind" jury instruction is not susceptible to harmless error review. In *Maynard v. Cartwright* and *Godfrey v. Georgia*, the Supreme Court reversed outright the death sentences based on unconstitutionally vague aggravating jury instructions, without engaging in any harmless error analysis. *See Maynard*, 486 U.S. at 363-66; *Godfrey*, 446 U.S. at 432-33. However, *Maynard* and *Godfrey* were both decided before *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and the impact of *Brecht* on the analysis in those cases is not entirely clear. We need not decide whether the structural error approach of *Maynard* and

Godfrey should be applied because we hold that the *Brecht* harmless error standard should be applied, if a *Walton* analysis is available, based on the failure of the Nevada Supreme Court to provide "close appellate scrutiny." As we discuss in the next section, the instructional error was not harmless under *Brecht*.

2. Harmless Error Analysis When There Has Been No "Close Appellate Scrutiny"

We have also held that, even if a *Walton* analysis is available, the Nevada Supreme Court failed to cure the instructional error because it did not provide the required "close appellate scrutiny." Under this view of the case, we must determine which of two possible harmless error standards applies. The first is the "rational factfinder" standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). The second is the "substantial and injurious effect or influence" standard of *Brecht*. For the reasons that follow, we believe that *Brecht* provides the appropriate standard in this case.

a. Harmless Error under *Jackson v. Virginia*

If a *Walton* analysis were available in this case despite the fact that the penalty-phase factfinder was a jury, and if the state appellate court had provided the required "close appellate scrutiny," we would evaluate the case under the "rational factfinder" standard of *Jackson*. Under *Jackson*, a federal habeas court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original). In *Jackson* itself, the "rational factfinder" standard was applied to factfinding by the trial-level factfinder when no error, other than insufficiency of the evidence, was asserted. In *Jeffers*, 497

U.S. at 781, the Supreme Court extended *Jackson* to factfinding by a state appellate court under *Walton*.

In *Jeffers*, the Court held that when a state appellate court, acting under *Walton*, provides a constitutionally valid narrowing interpretation of an aggravating circumstance, and then finds, on *de novo* review of the evidence, that the circumstance existed, a federal habeas court should provide a deferential review. "Where the issue is solely whether a state court has properly found the existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts 'to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of the facts that quite reasonably—perhaps even quite plainly—fit within the statutory language.' " *Id.* at 780-81 (citation omitted). "[A] federal court should adhere to the *Jackson* standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence[.]" *Id.* at 783.

However, we do not believe that the *Jackson* standard should be applied in this case. *Jeffers*' application of the *Jackson* "rational factfinder" standard is premised on the state appellate court's actually having performed the required "close appellate scrutiny" when it engaged in a *Walton* analysis. In the ordinary case, comity would require that we assume that the state court provided "close appellate scrutiny" when it made a *de novo* evidentiary determination that the constitutionally narrowed aggravating circumstance existed. But where, as here, it is clear from the face of the state appellate court's order that it has not provided such scrutiny, the premise for applying the *Jackson* standard does not exist.

b. Harmless Error under *Brecht v. Abrahamson*

[8] The usual standard for harmless error on federal habeas corpus for state prisoners is provided by *Brecht*. We hold that the *Brecht* harmless error standard applies when there has been a failure to engage in the "close appellate scrutiny" required when a state appellate court engages in a *Walton* analysis. Under *Brecht*, an error is not harmless if it has a "'substantial and injurious effect or influence in determining the jury's verdict.' " 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The state, rather than Valerio, bears the "risk of doubt" in our harmless-error analysis. *See O'Neal v. McAninch*, 513 U.S. 432, 439 (1995). Thus, the state must provide us with a "fair assurance" that there was no substantial and injurious effect on the verdict. *Gray v. Klauser*, 282 F.3d 633, 651 (9th Cir. 2002); *United States v. Hitt*, 981 F.2d 422, 425 (9th Cir. 1992). *See also O'Neal*, 513 U.S. at 443 ("the State normally bears responsibility for the error that infected the initial trial"); *Payton v. Woodford*, 299 F.3d 815, 828 (9th Cir. 2002) (en banc) ("Only if the State has persuaded us that there was no substantial and injurious effect on the verdict do we find the error harmless.").

Under the *Robins* narrowing construction, the jury should have been asked whether, beyond a reasonable doubt, the murder involved "torture, mutilation, or other serious and depraved physical abuse beyond the act of killing itself." In the instruction that was actually given, the jury was asked whether, beyond a reasonable doubt, the murder involved "torture, depravity of mind or mutilation of the victim." The jury answered "yes." Valerio has not challenged the constitutionality of the *Robins* narrowing construction, and we assume for purposes of this analysis that it is constitutional. The question for us, therefore, is whether the actual instruction had a 'substantial and injurious effect or influence" on the jury's

verdict, in comparison to what the verdict would have been if the narrowed instruction had been given.

Under the narrowed instruction, Valerio's counsel could have argued much more effectively than under the actual instruction that the aggravating circumstance was not present. We know that the prosecutor himself conceded that the evidence did not support a finding of "torture," even under the pre-*Robins* broad definition of torture. The prosecutor could still have argued under *Robins* for a finding of "mutilation," as he did during the actual penalty-phase trial, and for a finding of "serious physical abuse." But the prosecutor would have had greater difficulty making those arguments, for, under *Robins*, the mutilation and serious physical abuse must have been caused by an act "beyond the act of killing itself." 106 Nev. at 629.[43]

Based on the evidence in the record, a juror could readily have concluded that the victim died from the cumulative effect of all her wounds. The Nevada Supreme Court, in affirming the denial of Valerio's petition for post-conviction relief under NRS 177, stated as much, acknowledging the evidence that the victim "died not from one wound but from all wounds combined." If this is so, a juror could readily have concluded that none of the wounds constituted mutilation or serious physical abuse "beyond the act of killing itself."

[9] If a single member of the jury had been convinced under the narrowed construction that there was a reasonable doubt in favor of Valerio, the jury could not

---

[43] Under *Robins*, the phrase "beyond the act of killing itself" modifies all three conditions: torture *or* mutilation *or* depraved physical abuse. 106 Nev. at 629. *See also Browne v. State*, 113 Nev. 305, 316 (Nev. 1997) ("Mutilation requires an act beyond the act of killing itself.").

have returned a verdict finding that the aggravating circumstance existed. Given the relative ease with which a juror could have come to that conclusion based on the evidence presented, we conclude that the erroneous instruction had a "substantial and injurious effect or influence" on the verdict, and that the *Brecht* standard was met.

[10] We therefore reverse the district court and remand with instructions that, should the district court not issue a writ with respect to the guilt phase of Valerio's trial, it shall grant the petition for a writ of habeas corpus as to the penalty phase, unless the state within a reasonable period of time either grants a new penalty trial or vacates the death sentence and imposes a lesser sentence consistent with law.[44] The district court is also directed to provide any appropriate interim relief, pending a final decision on Valerio's guilt-phase claims, resulting from our holding that the death penalty was improperly imposed.

We next consider whether to grant a COA as to the issues that relate to the guilt phase of Valerio's trial.

III. Applicability of Circuit Rule 22-1

Valerio sought to appeal the denial of his second federal habeas petition after the April 24, 1996, effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. His appeal is therefore controlled by the appellate review

---

[44] The federal district court also granted a COA, and Valerio has pursued an appeal, on claim 15, on the issue of the sufficiency of the evidence, during the penalty phase, of torture and mutilation. To some degree, analysis of this issue has been subsumed in our analysis of the erroneous aggravating-circumstance jury instruction. To the degree that this issue is free-standing, it is moot in light of our granting of the writ as to the penalty phase.

provisions of AEDPA. *See Slack v. McDaniel*, 529 U.S. 473, 480-82 (2000). AEDPA requires that a habeas petitioner obtain a COA of specified issues as a precondition for appellate review. The requirement states, in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from:
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; ***
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

The word "judge" in § 2253(c)(1) includes not only a circuit judge but also a district judge. That is, both circuit and district judges have the authority under § 2253(c)(1) to grant COAs. *See United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997); *see also* Fed. R. App. P. 22(b)(1) ("In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, ... the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). ... If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate."). Although neither

AEDPA nor Federal Rule of Appellate Procedure 22 specifically so provides, a court of appeals not only has the power to grant a COA where the district court has denied it as to all issues, but also to expand a COA to include additional issues when the district court has granted a COA as to some but not all issues. *See Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999) (per curiam); *Cruz-Mendoza II*, 163 F.3d at 1149-50; *Cruz-Mendoza I*, 147 F.3d at 1074-75, *amended and superseded in part by Cruz-Mendoza II*.

We promulgated Ninth Circuit Rule 22-1 to specify detailed procedures for COA applications under § 2253(c) and Rule 22, including procedures for applying for an expanded COA. That rule provides, in pertinent part:

> (d) *Partial Denial By District Court; Motion By Petitioner.* If the district court denies a certificate of appealability in part, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification. Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issues(s) within thirty-five days of the district court's entry of its order denying a certificate of appealability.

Ninth Cir. R. 22-1(d).[45]

We addressed the applicability of Circuit Rule 22-1 to a petitioner in Valerio's situation in *United States v. Zuno-Arce*, 209 F.3d 1095 (9th Cir. 2000), *amended by* 245 F.3d 1108 (9th Cir. 2001). *Zuno-Arce* held that Rule 22-1 applies

---

[45] We note that we are currently considering amendments to Circuit Rule 22-1. However, those amendments have not yet been promulgated.

to a petitioner whose request for a COA was partially denied more than thirty-five days prior to the effective date of Rule 22-1, but whose briefing was completed after the effective date of the rule. 209 F.3d at 1100-01. For the reasons that follow, we overrule our decision in *Zuno-Arce*.

The effective date of Circuit Rule 22-1 was January 1, 1999. Prior to the adoption of Rule 22-1, we had no applicable circuit rule. In the absence of such a rule, we had held on June 23, 1998 that a petitioner who had received a partial COA from the district court could apply for an expanded COA from the court of appeals by the simple expedient of briefing the uncertified issue or issues to us. *See Cruz- Mendoza I*, 147 F.3d at 1074 ("We now hold that, in the interest of efficiency, where a district judge has issued a COA on some but not all of the issues, we will treat the briefing of an uncertified issue as a request for a COA and first decide whether one should issue."). In so holding, we cited and followed the practices of the Sixth and Seventh Circuits. *See id.* (citing *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997) (administrative order); *Williams v. Parke*, 133 F.3d 971, 975 (7th Cir. 1997)).

Valerio timely filed his notice of appeal in the district court on September 18, 1998. The district court entered an order granting the COA as to some issues and denying it as to others on October 15, 1998. Both dates are after our decision in *Cruz-Mendoza I* and before the effective date of Circuit Rule 22-1. That is, when Valerio filed his notice of appeal and when the district court partially granted and partially denied his request for a COA, the clearly stated, then-effective law of this circuit was that it was sufficient for a habeas petitioner to brief to the court of appeals the issues for which he sought an expanded COA.

Circuit Rule 22-1 changed the practice approved in *Cruz-Mendoza I*. The rule provides that petitioners wishing to expand a COA must file "*within thirty-five days* of the district court's entry of its order denying a certificate of appealability" a "*separate motion* for broader certification" in the court of appeals. Ninth Cir. R. 22-1 (emphasis added). When the rule became effective on January 1, 1999, two and one-half months had elapsed since the district court's partial denial of Valerio's request for a COA. Therefore, as of the effective date of the rule, Valerio could not possibly have complied with its requirement that a separate motion be filed within thirty-five days of the district court's denial.

Valerio never made a separate motion to this court for an expanded COA. Rather, he simply briefed the issues as to which he sought an expanded COA, in accordance with the practice we had endorsed in *Cruz-Mendoza I* six months before the effective date of Rule 22-1.[46] The question before us is whether Valerio's failure to make a separate motion for a COA, analogous to the separate motion specified in Rule 22-1, prevents him from obtaining an expanded COA, even though he has briefed the relevant issues to us. Stated otherwise, the question is whether the "separate motion" provision of Rule 22-1 applies, in a manner not specified in the rule, to a habeas petitioner who is unable to comply with the rule as it is written. Our answer is "no."

---

[46] *Cruz-Mendoza I* was amended on December 31, 1998, to conform to Circuit Rule 22-1, which became effective the next day. *See Cruz-Mendoza II*, 163 F.3d 1149, 1149. By the time *Cruz-Mendoza I* was amended, two and one-half months had elapsed since the district court's partial denial of Valerio's request for a COA. *Cruz-Mendoza II* did not decide whether Rule 22-1 should be applied in that case. Rather, it held that Cruz Mendoza had in any event not satisfied the criteria for issuance of a COA. *See* 163 F.3d at 1149-50.

Supreme Court and Ninth Circuit case law both lead us to the same result. In *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994), the Court wrote, "Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." But a rule may not be applied retroactively when doing so would "attach[ ]new legal consequences to events completed before its enactment." *Id.* at 270. Changes to previously established procedural practices or rules must be examined to determine whether or not application of a new or changed rule to pending cases is appropriate. *Id.* at 275 n.29 ("Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case.").

In *Volkswagenwerk Aktiengesellschaft v. Church*, 413 F.2d 1126 (9th Cir. 1969), we declined to apply a revised circuit rule shortening the time period for lodging exceptions to a cost bill to an appeal pending at the time the rule was adopted. We noted in *Volkswagenwerk* that the order adopting the new rule at issue had provided:

> [The new rule] shall govern in all such proceedings ... then pending, except to the extent that in the opinion of the court of appeals their application to a particular proceeding then pending *would not be feasible or would work an injustice*, in which case the former procedure may be followed.

Id. at 1127 (emphasis added).[47] We wrote, "[w]e think that

---

[47]We note that amendments to Federal Rules of Procedure are generally accompanied by an order of the Supreme Court providing that the rules are to be applied to pending appeals only "insofar as just and practicable." *See, e.g.*, Order of April 24, 1998, West Federal Criminal Code and Rules 341 (2002); Order of April 23, 1996, *id.*; Order of April 27, 1995, *id.*; Order of April 29, 1994, *id.* at 340; Order of April

in this case we should apply the former [rule] in order to avoid injustice." *Id.* at 1127-28. Even in the absence of such a specific statement in the order adopting a new circuit rule, our holding in *Volkswagenwerk* is applicable. Where the application of a new circuit rule - either directly or by analogy - would not be feasible or would work an injustice, that new rule should not be applied. Even where we do not explicitly so state, we view such a statement as implicit in the promulgation of any circuit rule.

Circuit Rule 22-1, by its own terms, has no provision applicable, in any respect, to a petitioner in Valerio's position. The rule does not, for example, direct a petitioner for whom more than thirty-five days have already elapsed at the effective date of the rule to file a separate motion within thirty-five days of the effective date. In the absence of any direction to a petitioner in Valerio's position - or, indeed, any acknowledgment that someone in his position even existed - it was not unreasonable for Valerio to assume that the rule simply did not apply to him. This is particularly so given that, prior to the adoption of the Rule, *Cruz-Mendoza I* had specifically approved briefing to the court of appeals as a mechanism for seeking an expanded COA. *See* 147 F.3d at 1074.

We therefore hold that Circuit Rule 22-1 does not apply, either directly or by analogy, to habeas appeals in which an expanded COA is sought in the court of appeals, and in which the district court's order denying a COA was entered before the effective date of the Rule. For such cases, we hold that the procedure we approved in *Cruz-Mendoza I*, in which briefing of the uncertified issue or issues in the court of appeals is treated as a request for an expanded COA, is available to a petitioner. In the case before us, we specifically hold that Valerio's briefing of

---

22, 1993, *id.*; Order of April 30, 1991, *id.*; Order of April 25, 1989, *id.*; Order of March 10, 1986, *id.*; Order of April 30, 1979, *id.*

issues as to which the district court denied a COA is a procedurally proper request to this court for an expanded COA.

There are two groups of claims for which Valerio sought an expanded COA. In the first group are three newly added claims that the district court dismissed for abuse of the writ. In the second group are numerous claims that the district court dismissed because of asserted procedural default in state court. All of these claims relate to the guilt phase of Valerio's trial. We now turn to the two groups of claims, and consider whether to grant an expanded COA.

IV. Abuse of the Writ

A. Application of *Slack v. McDaniel*

Because Valerio's first federal habeas corpus petition contained exhausted and unexhausted claims, the district court properly dismissed the petition under *Rose v. Lundy*, 455 U.S. 509, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982). After Valerio presented his unexhausted claims to the state court, he filed a new habeas petition in federal court. The new petition contains not only the now-exhausted claims, but also three new claims that had not been presented in the previous federal petition. Relying on our decision in *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), the district court dismissed these newly added claims as an "abuse of the writ." After the district court dismissed Valerio's newly added claims, the Supreme Court reversed *Farmer* in *Slack v. McDaniel*, 529 U.S. 473 (2000). Valerio has now sought an expanded COA that would include these three claims. Following the procedure set forth in *Slack*, and based on *Slack's* reversal of *Farmer*, we grant an expanded COA as to these claims.

We may grant Valerio's request for an expanded COA only if he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has relied on a procedural ground to dismiss a claim, our decision whether to grant a COA has "two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." *Slack*, 529 U.S. at 484-85. *See also Petrocelli v. Angelone*, 248 F.3d 877, 883 (9th Cir. 2001). Because this is a capital case, we resolve in Valerio's favor any doubt about whether he has met the standard for a COA. *Id.* at 884.

We first address the procedural holding of the district court. Valerio satisfies the procedural component of *Slack* if he shows "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Rule 9(b) of the Rules Governing Section 2254 Cases provides: "A *second or successive petition* [alleging new and different grounds] may be dismissed if ... the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an *abuse of the writ*" (emphasis added). The district court concluded, relying on *Farmer*, that Valerio's second federal habeas petition was a "second or successive petition" under Rule 9(b), and that the inclusion of the three new claims was an abuse of the writ. However, the Supreme Court subsequently held in *Slack* that a federal habeas petition filed after an earlier petition has been dismissed for failure to exhaust is not a "second or successive petition" within the meaning of Rule 9(b). *See Slack*, 529 U.S. at 486-87.

Because dismissal of a claim for abuse of the writ under Rule 9(b) is premised on the supposedly abusive claim's having been included in a second or successive petition, such a dismissal is not available when the earlier petitions were dismissed for failure to exhaust. *See id.* The

district court's dismissal of Valerio's three new claims for abuse of the writ was thus based on an erroneous view of the law, for, as we now know from *Slack*, Valerio's second federal habeas petition was not a second or successive petition within the meaning of Rule 9(b). Our conclusion that the district court erred "more than meets *Slack's* requirement that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.' " *Petrocelli*, 248 F.3d at 885 (quoting *Slack*, 529 U.S. at 478).

We next address the underlying constitutional rights asserted in Valerio's three newly added claims. Under the second component of *Slack*, Valerio must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." 529 U.S. at 484. Because the claims were dismissed on procedural grounds by the district court and were not developed or argued on the merits in that court, we "simply take a 'quick look' at the face of the complaint to determine whether the petitioner has 'facially alleged the denial of a constitutional right.' " *Petrocelli*, 248 F.3d at 885 (citations omitted).

The new claims are an amendment to claim 16(h), and new claims 17(m) and 25. Amended claim 16(h) and claim 17(m) allege that Valerio received ineffective assistance of counsel in violation of the Sixth Amendment. Claim 25 alleges that the prosecution withheld exculpatory evidence in violation of the Due Process Clause of the Fourteenth Amendment. *See Brady v. Maryland*, 373 U.S. 83 (1963). Because all three claims facially allege violations of constitutional rights, the substantive component of *Slack* is clearly satisfied.

We therefore grant the broadened COA and remand to the district court to allow it to deal appropriately with

Valerio's three newly added claims.

B. Unexhausted Claims and Mixed Petition

It is possible that none of the three newly added claims has been exhausted in state court. Two of the three - amended claim 16(h) and claim 17(m) - are based on ineffective assistance of counsel, and *may* be exhausted. Valerio has already presented IAC claims to the state court, and those IAC claims are exhausted. If the two new claims are sufficiently related to the exhausted claims, they, too, are exhausted. The question under *Humphrey v. Cady*, 405 U.S. 504, 517 n.18 (1972), is whether they are "so clearly distinct from the claims ... already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim." The district court has not yet applied a *Humphrey* analysis, and we will not prejudge the result here. It is enough for our purposes to note that the two new IAC claims may, or may not, be exhausted. The third new claim - claim 25 - is a *Brady* claim. Valerio has made no *Brady* claim to the state courts, and this claim therefore appears to be unexhausted. The claim may be time-barred in state court, *see, e.g.*, NRS 34.726, NRS 34.800; *see also Pellegrini*, 34 P. 3d at 526, but we are not in a position to decide that question.

When the district court decided the merits of Valerio's claim that the depravity of mind jury instruction was unconstitutional, there were no pending unexhausted claims. The district court had dismissed the three newly added claims for abuse of the writ, and thus when the district court acted the petition did not contain both exhausted and unexhausted claims. The district court thus did not violate the rule of *Rose v. Lundy*, which forbids a district court to decided exhausted claims that are contained in a "mixed" petition. *See* 455 U.S. at 510.

However, because of our holding that the district court erred in dismissing the claims for abuse of the writ, we have now revived the three claims. Once we have revived these claims, we are faced with the question of whether we should decline to rule on an exhausted claim contained in the mixed petition that we have created. We believe that despite the revival of these three claims in this court, we are acting appropriately in deciding Valerio's exhausted claim that the depravity-of-mind jury instruction was unconstitutional. *See* Part II, *supra*.

The prohibition against deciding an exhausted claim in a mixed petition is not jurisdictional. The Supreme Court made this clear in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), where it decided an exhausted claim decided by a district court in a mixed petition, holding that "the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional."

Moreover, the strictness of the prohibition against ruling on claims in mixed petitions is primarily directed at the district courts. Indeed, *Rose v. Lundy* itself is directed *only* at the district courts. *See, e.g.*, 455 U.S. at 510, 522 ("[W]e hold that a *district court* must dismiss such 'mixed petitions[.]' "; "[W]e hold that a *district court* must dismiss habeas petitions containing both unexhausted and exhausted claims.") (emphases added). In *Granberry v. Greer*, 481 U.S. 129, 131 (1987), the Court addressed the courts of appeals, emphasizing that "there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition, notwithstanding the lack of complete exhaustion." In that case, where the State had not raised exhaustion as a defense, the Court remanded to the court of appeals to allow it "to determine *whether the interests of justice would be better served* by addressing the merits of the habeas petition or by requiring additional state proceedings before doing so." *Id.*

at 134 (emphasis added). For the reasons that follow, we believe that the "interests of justice would be better served" by addressing the merits of Valerio's fully exhausted jury instruction claim.

First, at the time the jury instruction claim was decided by the district court, the petition was not mixed, and the district court acted in full compliance with *Rose v. Lundy*. Then, when Valerio and the State briefed and argued to us, neither of them mentioned to us the problem that might be created if we revived the claims. *Compare Simmons v. Blodgett*, 110 F.3d 39, 41 (9th Cir. 1997) ("While we might otherwise be concerned that it is contrary to the interests of comity for a federal court to act on habeas review while an appeal is pending in the state court system, in this case the State has not raised the point .... Because exhaustion is not jurisdictional, we have no sua sponte obligation to pursue the problem further."). Indeed, at the time the three-judge panel decided Valerio's appeal to this court, *Slack v. McDaniel* had not been decided, and the basis for reviving the claims did not even exist.

Second, to the degree that there is a problem, we created it. That is, only when we revived the three claims in this court did the petition become mixed. We also created the problem in another sense. The district court dismissed the three claims for abuse of the writ because it was following our holding in *Farmer v. McDaniel*. The Supreme Court then overruled *Farmer* in *Slack*. If we had decided *Farmer* correctly, the district court would have been able, in the first instance, to determine whether some or all of the newly added claims were exhausted. The district court would then have been able to exercise its discretion under *Calderon v. District Court (Taylor)*, 134 F.3d 981, 989 (9th Cir. 1998), to determine whether to grant a stay and hold Valerio's petition in abeyance to allow Valerio to exhaust. If the district court had declined to

allow the stay-and-abeyance procedure of *Taylor*, Valerio could then have decided whether to dismiss his unexhausted claims in order to proceed with his exhausted claims.

In another case in which we created a similar problem, we decided a number of unexhausted claims. In *Hendricks v. Zenon*, 993 F.2d 664 (9th Cir. 1993), petitioner alleged a violation of his Sixth Amendment right to counsel on appeal when he had been obliged to represent himself in the state appellate court on direct appeal. He also alleged a number of other constitutional violations, none of which had been presented to the state appellate court in a counseled appeal. We held that his Sixth Amendment right had been violated and granted the writ unless the state allowed a counseled appeal. We recognized that because the non-Sixth Amendment claims would now almost certainly be presented to the state appellate court, they had been rendered unexhausted by our Sixth Amendment holding: "[W]e now find ourselves in the position of having 'unexhausted' the remainder of [petitioner's] Constitutional claims." *Id.* at 672. We nevertheless decided these unexhausted claims, stating that "we believe it to be in the interests of justice to exercise our authority and to decide these issues now rather than later." *Id.* If we appropriately believed it to be in the "interests of justice" to decide petitioner's unexhausted claims in *Hendricks*, where we created the exhaustion problem ourselves, the appropriate course in the present case is easy to discern. In this case, where we also created the problem, we now decide not numerous *unexhausted* claims, as in *Hendricks*, but rather a single *exhausted* claim.

Third, the jury instruction claim is obviously one of the most important - possibly the most important - claim in Valerio's petition. Valerio sought and received COAs on

three specifically enumerated issues in the district court. The remainder of his request for a COA in the district was a general, undifferentiated request as to all other issues, which was denied by that court. On appeal to us, Valerio pursued two of the three COAs that were granted by the district court, both of which focused on the depravity of mind aggravating circumstance jury instruction. And as we have held, *supra* Part II, the unconstitutionality of that instruction compels a granting of the writ as to the penalty phase.

By contrast, the three claims that now may make this a mixed petition are relatively unimportant. The two IAC claims are additions to already exhausted IAC claims, and it is not clear how much they add to those claims. (Moreover, as discussed above, it is not even clear that these two claims are unexhausted.) The *Brady* claim may have substantive merit, but there is an obvious possibility it will be held time barred in the state courts if Valerio attempts to exhaust it. (If so, it is possible that the claim is exhausted because it is procedurally barred. *See Phillips v. Woodford*, 267 F.3d 966, 974 (9th Cir. 2001) ("[T]he district court correctly concluded that Phillips's claims were nonetheless exhausted because 'a return to state court would be futile.' ").) If we allow the presence of these three revived claims to prevent us from reaching the merits of Valerio's jury instruction claim, we will be allowing a very small tail to wag a very large dog.

Finally, the interests of judicial efficiency would be served by deciding Valerio's jury instruction claim now. To state it bluntly, to send this case back to the district court without deciding the jury instruction claim would be a colossal waste of time. At some point, "judicial ping-pong between the state and federal courts" serves no useful purpose. *Harris v. Reed*, 489 U.S. 255, 270 (1989) (O'Connor, J., concurring). We believe that we have

reached that point in this case.

C. Procedure on Remand

Although a district court must dismiss a "mixed" petition, containing both exhausted and unexhausted claims, *see Rose v. Lundy*, it may not dismiss a mixed petition without giving the petitioner the opportunity to delete the unexhausted claims. *See Tillema v. Long*, 253 F.3d 494, 503 (9th Cir. 2001). However, if Valerio's potentially unexhausted claims are deleted in order to allow the exhausted claims to go forward immediately,[48] the now-unexhausted claims will be time-barred by AEDPA's one-year statute of limitations if they are exhausted and then refiled in federal court. *See* 28 U.S.C. § 2244(d). In order to avoid exceeding the limitations period for the newly added claims, the district court may, in its discretion, grant a stay and hold Valerio's petition in abeyance during the pendency of the state court proceedings for these claims. *See Taylor*, 134 F.3d at 989; *James v. Pliler*, 269 F.3d 1124, 1127 (9th Cir. 2001) (suggesting that district court on remand might grant stay-and-abeyance). If the district court declines to grant a stay, it must inform Valerio that, absent equitable tolling, he will be time-barred under AEDPA on all of his claims if he does not choose to dismiss his unexhausted claims in order to proceed in federal court with his exhausted claims.

---

[48] Because we remand some exhausted claims, as discussed in Part V, *infra*, some properly exhausted claims will again be before the district court.

Volume 2 of 2

V. Procedural Default in State Court

After Valerio's first federal habeas corpus petition was dismissed because it contained unexhausted claims, Valerio filed another petition for post-conviction relief in state court, this time a petition for habeas corpus under NRS Chapter 34. (As recounted *supra*, Valerio's first petition for post-conviction relief was filed under NRS Chapter 177.) The new state-court petition contained 24 claims, some with numerous subparts.

The Nevada district court divided the claims into two groups and, in an unpublished order, dismissed all of them. The first group contained claims 1-18.[49] The Nevada district court wrote that Valerio "concede[d]" that all of these claims had been previously raised. It held them barred by NRS 34.810(2), which provides, in relevant part: "A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits ...."[50]

---

[49] The claims in Valerio's current federal petition are identical to, and have the same numbering as, the claims in his second state petition, with the exception of the three newly added claims, an amendment to 16(h), and claims 17(m) and 25.

[50] NRS 34.810 provides:

> 1. The court shall dismiss a petition if the court determines that:
>
> ***
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> (1) Presented to the trial court;
>
> (2) Raised in a direct appeal or a prior petition for a writ of

The second group contained claims 19-24. These were new claims based on what Valerio alleged to be recently recollected conversations with his trial counsel. The state district court held these claims barred by the second clause of NRS 34.810(2), which provides, in relevant part: "A second or successive petition must be dismissed if ... new or different grounds are alleged, [and] the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." The state district court held, further, that Valerio's failure to present these claims earlier was not excused under NRS 34.810(3) because he had not shown "good cause" and "actual prejudice."

On appeal, the Nevada Supreme Court affirmed in a published opinion. *See Valerio v. State*, 112 Nev. 383, 386

---

habeas corpus or post-conviction relief; or

(3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

(Nev. 1996). As to claims 1-18, it noted that the state district court had been mistaken, in that only some (rather than all) of these claims had previously been presented to a state court. Without specifying which claims had, and which claims had not, previously been presented, the Nevada Supreme Court upheld the state district court's dismissal of all of them:

> As for the grounds among claims 1-18 which have not been determined on the merits, we hold that the district court properly dismissed these grounds pursuant to NRS 34.810 since Valerio could have raised them in his first petition, and his failure to do so constituted an abuse of the writ.
>
> We further hold that the district court did not err in dismissing those grounds among claims 1-18 which *had* been determined on the merits. These claims may not be raised again because this court's prior orders dismissing them constitute the law of the case.

Id. at 386-87 (emphasis in original). As to claims 19-24, all of which were newly presented, the Nevada Supreme Court agreed with the district court that Valerio had failed to present them earlier and that he had not shown "good cause" and "actual prejudice" that would excuse his failure. *Id.* at 388.

In reviewing Valerio's second federal habeas petition, the federal district court held that some of Valerio's claims had been properly raised and exhausted in state court and were therefore not procedurally defaulted for purposes of federal habeas review.[51] The district court dismissed all of

---

[51] Because Valerio had presented the claims in his first petition, brought pursuant to NRS Chapter 177, the Nevada Supreme Court

those claims on the merits. Valerio requested a COA on all of the dismissed claims, but the district court only granted the request as to three penalty phase claims.[52] Valerio did not argue in his briefs to us that the COA should be expanded to address the guilt phase claims that the district court dismissed on the merits. Because we construe Valerio's briefs as a request for an expanded COA only on the issues discussed therein, *see* discussion *supra* Part III, Valerio's failure to contest in his briefs the district court's dismissal of his guilt phase claims means that those claims are not properly before us.[53]

Valerio did, however, contest in his briefs the district court's finding that his remaining guilt phase claims were

---

held that these claims were barred for state purposes when Valerio raised them again in his Chapter 34 petition. However, the claims had been presented to the Nevada state courts and thus were properly exhausted, and not procedurally barred, for purposes of federal review. Those claims are 1-3 (asserting prejudicial admission of evidence); 9 (improper and prejudicial closing argument during the guilt phase); 13 (improper closing argument by the prosecutor in the penalty phase); 14 (vague instruction on aggravating circumstance in the penalty phase); 15 (insufficiency of the evidence of toture and mutilation); 16(a), (f), (h), (i), (m), (q)-(s), (x), and (y) (ineffective assistance of trial counsel); and 17(b), (d), (j), and (l) (ineffective assistance of appellate counsel).

[52] As noted earlier in the opinion, those claims were numbers 13, 14 and 15. Valerio did not pursue claim 13 on appeal. Claim 14 is the basis for our setting aside the death penalty. To some extent, claim 15 is subsumed in our analysis of claim 14; to the extent claim 15 is freestanding, it is moot in light of our holding as to claim 14.

[53] We note that although Valerio has not requested an expanded COA to address the district court's dismissal of his guilt phase claims listed *supra* in footnote 16, he has contested in his brief the district court's dismissal of his claim of cumulative error on the ground of procedural default. Because we remand the cumulative error claim for consideration on the merits, *see* discussion *infra*, to the extent that claims 1-3; 9; 16(a), (f), (h), (m), (q)-(s), (x), (y); and 17(b), (d), (j), (l) are included in the cumulative error claim, they are before the district court on remand.

procedurally defaulted. The district court agreed with the Nevada Supreme Court that Valerio had procedurally defaulted those claims among claims 1-18 that had never been presented to the Nevada state courts, and on that ground dismissed those claims.[54] The district court also agreed that claims 19-24 were procedurally defaulted and dismissed them. Valerio now seeks an expanded COA on the issue of whether the district court correctly dismissed these claims as procedurally defaulted. He argues that the claims should not have been held procedurally defaulted because the state court had not applied its procedural rules with sufficient clarity and regularity.

The principles of state-court procedural default in federal habeas corpus are well-established. A federal habeas court cannot review a claimed denial of a federal constitutional right if the petitioner has failed to present the claim to the state court because of a procedural default in that court. A default under an independent and adequate state procedural rule operates as a bar in federal court unless the petitioner can show cause for and prejudice from the default. *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Wells v. Maass*, 28 F.3d 1005, 1008 (9th Cir. 1994) ("[T]he procedural default doctrine is a specific application of the general adequate and independent state grounds doctrine.").

In order for a state procedural rule to serve as an adequate state ground, it must be regularly followed by

---

[54] Those claims are 4-5 (prejudicial admittance of evidence during trial); 6-7 (violation of right to confrontation); 8 (prejudicial admittance of evidence during trial); 10 (improper closing argument by the prosecutor during the guilt phase); 11 (prejudicial admittance of evidence during trial); 12 (failure to preserve evidence); 16(b)-16(e); 16(g); 16(j)-16(l); 16(n)-16(p); 16(t)-16(w); 16(z); 16(aa)-16 (kk) (ineffective assistance of trial counsel); 17(a); 17(c); 17(e)-17(i); 17(k) (ineffective assistance of appellate counsel); 18 (cumulative error); 19-24 (ineffective assistance of trial counsel).

the state courts. "[A] state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' " *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (citation omitted); *see also Poland v. Stewart*, 169 F.3d 573, 585 (9th Cir. 1999) ("A state procedural rule constitutes an adequate bar to federal court review if it was 'firmly established and regularly followed' at the time it was applied by the state court." (quoting *Ford v. Georgia*, 498 U.S. 411, 424 (1991))). The rule must also be actually relied on in the particular case in question. "In habeas, if the decision of the last state court to which the petitioner presented his federal claims ... did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). "[A] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review." *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996).

We discuss Valerio's request for a COA as to the claims the district court held procedurally defaulted in two parts, tracking the Nevada Supreme Court's opinion. First, we address the claims remaining from Valerio's first group of 18 claims: claims 4-8, 10-12, and 16-18.[55] The Nevada court held these claims barred because they either had or had not been previously determined on the merits. We then discuss claims 19-24, which the Nevada Supreme Court held barred because Valerio could have presented them in an earlier petition and failed to do so.

A. Claims 4-8, 10-12, and 16-18

Because the district court relied on a procedural ground to dismiss Valerio's supposedly defaulted claims,

[55] The particular subparts of claims 16 and 17 at issue are set forth in footnote 19, *supra*.

we apply the analysis prescribed in *Slack v. McDaniel*, evaluating both the procedural ground and the underlying constitutional claim to determine if they are "debatable" among "jurists of reason." *Slack*, 529 U.S. at 484.

We first evaluate the procedural ground. In affirming the Nevada district court's dismissal of claims 1-18, the Nevada Supreme Court failed to specify which claims had previously been presented to the state court and could not be relitigated, and which had never been presented to state court and had been waived. The facts of this case are indistinguishable from those in *Calderon v. United States District Court (Bean)*, 96 F.3d 1126 (9th Cir. 1996). In *Bean*, two groups of claims were presented to the California Supreme Court on state habeas corpus. One group (the *Waltreus* group) had already been raised on appeal in state court and could not be presented again in state court. *See In re Waltreus*, 62 Cal.2d 218 (1965). The other group (the *Harris/Dixon* group) had not been raised and had therefore been waived. *See In re Harris*, 5 Cal. 4th 813, 825 n.3 (1993) (discussing *In re Dixon*, 41 Cal.2d 756, 264 P.2d 513 (1953)). In denying the petition, the California Supreme Court cited both *Waltreus* and *Harris/Dixon* as bases for its decision and did not specify which claims fell in which group. We held that the California Supreme Court order was not sufficiently clear to bar federal habeas corpus review of the claims:

> The order, which we agree with the district court is ambiguous, does not specify which of Bean's thirty-nine claims the court rejected under *Waltreus*, and which it rejected under *Harris/Dixon*. "[A] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral

> review." The district court properly declined to dismiss these claims.

Bean, 96 F.3d at 1131 (citation omitted).

Based on *Bean* and *Coleman v. Thompson*, we hold that the district court erred in finding a state-court procedural default as to claims 4-8, 10-12, and 16-18.[56] By failing to specify which claims were barred for which reasons, the Nevada Supreme Court "did not clearly and expressly rely on an independent and adequate state ground." *Coleman*, 501 U.S. at 735. Our holding that the federal district court erred in finding a procedural default as to these claims necessarily means that the procedural prong of *Slack* has been satisfied.

We next evaluate the underlying constitutional claims. Because the merits of Valerio's constitutional contentions under claims 4-8, 10-12, and 16-18 were not developed in the federal district court, the substantive prong of *Slack* requires only that we "simply take a 'quick look' at the face of the complaint to determine whether the petitioner has 'facially allege[d] the denial of a constitutional right.' " *Petrocelli*, 248 F.3d at 885 (citation omitted); *see also Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000). Our "quick look" reveals that all of Valerio's claims facially allege the denial of a constitutional right. Claims 4, 5, 8, and 11 all allege prejudicial admission of evidence at trial. Although evidence questions are questions of state law, improper admission of evidence can amount to a due process violation if it "is clearly prejudicial and 'rendered

---

[56] Because we hold, based on *Bean* and *Coleman v. Thompson*, that there was no adequate state ground for finding procedural default in state court as to claims 1-18, we do not need to reach Valerio's additional contention, as to these claims, that the Nevada state courts did not apply their procedural default rules with sufficient regularity to bar federal habeas corpus review.

the trial fundamentally unfair.' " *Drayden v. White*, 232 F.3d 704, 710 (9th Cir. 2000) (quoting *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1466 (9th Cir. 1986)). Claims 6 and 7 allege the violation of Valerio's constitutional right to confrontation under the Sixth Amendment. Claim 10 alleges improper argument by the prosecutor during the guilt phase of Valerio's trial. Improper argument violates a defendant's right to due process if "the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Thompson v. Borg*, 74 F.3d 1571, 1576 (9th Cir. 1996) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Claim 12 alleges failure to preserve evidence. This claim, too, alleges a potential due process violation. *See United States v. Hernandez*, 109 F.3d 1450, 1455 (9th Cir. 1997). The subparts of claims 16 and 17 at issue allege ineffective assistance of counsel at trial and on direct appeal in violation of the Sixth Amendment. Finally, claim 18 alleges cumulative error amounting to a due process violation. Although the standard for actually proving the due process violations Valerio alleges in these claims is high, we do not consider the merits of the claims at this point. Rather, we need only consider the face of the complaint. *See Lambright*, 220 F.3d at 1028-29.

We therefore grant an expanded COA as to claims 4-8, 10-12, and 16-18.[57] We remand to the district court for appropriate disposition of those claims.[58]

---

[57] For the sake of clarity, we note again as to claims 16 and 17 that we grant the expanded COA only as to the following subparts: 16(b)-16(e); 16(g); 16(j)-16(l); 16(n)-16(p); 16(t)-16(w); 16(z); 16(aa)-16 (kk); 17(a); 17(c); 17(e)-17(i); 17(k).

[58] To the extent that any of these remanded claims address allegations of unconstitutional wrongs with respect to the penalty phase, including portions of claims 16(k), 16(cc)-16(kk), 17(j), and 17(k), those claims are moot in light of our granting the writ as to the penalty phase.

B. Claims 19-24

As we did for claims 1-18, we follow the two-step procedure of *Slack v. McDaniel* for claims 19-24. We first evaluate the procedural component. As noted, *supra*, Valerio satisfies the procedural component of *Slack* if he shows "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Claims 19-24 were presented to the Nevada courts for the first time in Valerio's second post-conviction petition, brought under NRS Chapter 34. The Nevada Supreme Court affirmed the holding of the district court that these claims were barred by NRS 34.810 on the ground that Valerio had not raised them in his earlier post-conviction petition under NRS Chapter 177. *See Valerio v. State*, 112 Nev. at 388-89. Valerio contends that his procedural default in state court does not bar our review on federal habeas corpus because Nevada state courts have not "strictly or regularly followed" the procedural bar enforced in his case. *Johnson*, 486 U.S. at 587.

"In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established *at the time of petitioner's purported default.*" *Wells*, 28 F.3d at 1010 (emphasis added); *see also Ford*, 498 U.S. at 424; *Fields v. Calderon*, 125 F.3d 757, 760 (9th Cir. 1997). The time of Valerio's asserted default was 1990, when he filed his petition under NRS Chapter 177. The procedural default, if any, occurred at this time because Valerio omitted the claims from his Chapter 177 petition, and it is the consequence of this omission that is in dispute. We must determine whether there was a "clear, consistently applied, and well-established" rule in Nevada state courts in 1990 that barred Valerio from asserting in a

later petition claims that he failed to assert in his Chapter 177 petition.

From our review of the Nevada cases, it is plain that at the time of Valerio's default the Nevada Supreme Court in capital cases had what we frankly regard as a commendable policy of exercising discretionary *sua sponte* power to overlook failures to present constitutional claims in earlier proceedings. The court exercised this power both on direct appeal and on postconviction review. It exercised this power when there was a failure to make the objection at trial; a failure to include the claim on direct appeal from the conviction and sentence; and a failure to include the claim in an earlier post-conviction petition. And it exercised this power in both published opinions and unpublished orders.

In *Jones v. State*, 101 Nev. 573 (Nev. 1985), the defendant failed to present a constitutional objection to an instruction at trial. The Nevada Supreme Court, on direct appeal, nevertheless addressed the objection on the merits. It wrote, "In a capital case where the record is sufficiently developed to provide an adequate basis for review and to demonstrate that fundamental rights are implicated, it is appropriate to hear a constitutional question for the first time on appeal." *Id.* at 580. In *Flanagan v. State*, 104 Nev. 105 (Nev. 1988), the defendant failed to comply properly with the Nevada contemporaneous objection rule during the penalty-phase trial. The Nevada Supreme Court, on direct appeal, nevertheless decided the objections on the merits "where a life is at stake." *Id.* at 108.

In *Hill v. State*, 114 Nev. 169 (Nev. 1998), the defendant failed, both in his trial in 1983 and on direct appeal in 1986, to argue that execution of a retarded person violated the Eighth Amendment. On petition for post-conviction relief, the Nevada Supreme Court addressed and rejected

on the merits (without mentioning the procedural default) both an IAC claim for failing to raise the Eighth Amendment, and the Eighth Amendment claim itself. *See id.* at 176-78. In *Pertgen v. Nevada*, 110 Nev. 554 (Nev. 1994) (per curiam), the defendant failed to raise an IAC claim and other constitutional claims on direct appeal. On petition for post-conviction relief, the Nevada Supreme Court addressed all of the claims despite petitioner's failure to raise them on direct appeal:

> [T]he power of this court to address plain error or issues of constitutional dimension *sua sponte* is well established. Because this case involves the ultimate punishment and because appellant's claims of ineffective assistance of counsel are directly related to the merits of his claims, we will consider appellant's claims on the merits in order to determine whether appellant received ineffective assistance of counsel.

Id. at 560 (citations omitted).

In Valerio's own case, on his first post-conviction petition under NRS Chapter 177, the Nevada Supreme Court exercised its *sua sponte* power, in a 1992 unpublished order, to address a constitutional claim that Valerio had failed to present on direct appeal. As recounted, *supra*, Valerio challenged the "depravity of mind" aggravating-circumstance instruction in his Chapter 177 petition, but he had failed to challenge that instruction at trial or on direct appeal. The state district court said that the claim had not been raised, but then decided (and rejected) it on the merits. On appeal, the Nevada Supreme Court rejected the claim on the merits without mentioning the procedural default, and without analyzing it in the context of Valerio's IAC claim. *Cf.*

Pellegrini, 34 P. 3d at 534-35 (stating that claims not raised on direct appeal are considered in later proceedings only in the context of IAC claims).

On review of Valerio's second post-conviction petition, brought under NRS Chapter 34, the Nevada Supreme Court held in 1996 that claims 19-24 were procedurally defaulted because Valerio had failed to raise them in his earlier Chapter 177 petition. *See Valerio v. State*, 112 Nev. 383 (Nev. 1996). The court rejected Valerio's argument that it had "inconsistently applied the procedural default and waiver rules":

> [Valerio] contends that since his petition presented errors of constitutional dimension on its face, and since this court has a "policy" of reviewing errors of constitutional dimension which appear on the face of the record irrespective of the doctrines of procedural default and waiver, the [Nevada] district court erred in failing to address the merits of Valerio's claim and should be reversed.
>
> We note at the outset that reversal of the district court's order for its failure to recognize this court's "policy" of reviewing plain constitutional error is not mandated. Moreover, arguments regarding the consistent or inconsistent applications of a procedural bar are aimed at the federal courts rather than this court. *See Kills on Top v. State*, 273 Mont. 32, 901 P.2d 1368, 1386 (1995). In any event, contrary to the assertion of the Ninth Circuit [citing *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir. 1995)], we note that this court has not inconsistently applied post-conviction procedural bars.

Id. at 389-90. One Justice dissented from the refusal to review Valerio's constitutional claims:

> I believe that this court has a proper and established policy of addressing facial errors of constitutional magnitude, in death cases [citing *Pertgen v. State*, 110 Nev. 554, 560 (1994); *Emmons v. State*, 107 Nev. 53, 60-61 (1991); *Flanagan v. State*, 104 Nev. 105, 108 (1988)]. I think it should follow such a policy in this case.

Id. at 390 (Springer, J., dissenting).

Based on the foregoing, we hold that in 1990 there was no "clear, consistently applied, and well-established" rule in capital cases that prevented the Nevada Supreme Court from addressing constitutional claims on the ground that those claims had not been presented in earlier proceedings. The number and the variety of cases in which the Nevada Supreme Court addressed constitutional claims on the merits in capital cases, despite unexcused failures to present these claims in earlier proceedings, lead us to conclude that the court exercised a general discretionary power to address them.

Our conclusion comports with our prior case law addressing Nevada's procedural bar rules. We have twice held that Nevada's procedural rules barring petitioners from raising constitutional claims that could have been raised previously are not adequate to bar federal review in capital cases. In both cases we held that - at times shortly before Valerio's default - the Nevada Supreme Court had discretion in capital cases to consider constitutional claims despite a failure to raise those claims in earlier proceedings. *See Petrocelli v. Angelone*, 248 F.3d 877 (9th Cir. 2001) (failure to raise constitutional claims in earlier

post-conviction petition; defaults in 1983 and 1985); *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995) (failure to raise constitutional claim on direct appeal; default in 1985 or somewhat earlier).

Our holdings in *Moran v. McDaniel*, 80 F.3d 1261, 1269 (9th Cir. 1996), and *Bargas v. Burns*, 179 F.3d 1207, 1211 (9th Cir. 1999), are consistent with *Petrocelli* and *McKenna*, and with our holding in this case. We held in *Moran* that the Nevada Supreme Court adhered with sufficient regularity to the specific timeliness bars contained in NRS 34.726 and NRS 34.800 for them to serve as procedural defaults in a federal habeas proceeding, even in capital cases. However, *Moran* does not affect our conclusion here that the Nevada Supreme Court did not adhere regularly to rules barring review of a constitutional claim that could have been brought in an earlier proceeding. We held in *Bargas* that Nevada's rule provides that a petitioner procedurally defaults a claim when he fails to appeal from the denial of post-conviction relief, *see id.* at 1211, but *Bargas* was not a capital case. The fact that the Nevada Supreme Court did not exercise its discretion to consider defaulted claims in non-capital cases is consistent with its use of that discretion to hear such claims when a death sentence is at issue.

We therefore hold that the procedural bar asserted by the Nevada Supreme Court in Valerio's case, preventing him from presenting claims 19-24 in his Chapter 34 petition, is not "adequate" to prevent review of those claims on federal habeas corpus. Our holding that the federal district court erred in finding these claims procedurally defaulted necessarily means that the procedural component of *Slack* has been satisfied.

Because the district court dismissed claims 19-24 for procedural default, the substantive component of *Slack*

requires only that we "simply take a 'quick look' at the face of the complaint" to determine if Valerio has made a facial allegation of the denial of a constitutional right. Claims 19-24 all allege ineffective assistance of trial counsel, in violation of the Sixth Amendment. The substantive component of *Slack* is thus satisfied.

We therefore grant an expanded COA with respect to claims 19-24 and remand them to the district court.

VI. Conclusion

With respect to the penalty phase, we hold that a *Walton* analysis is not available when a jury rather than a judge has determined whether there were aggravating and mitigating circumstances. We also hold, however, that even if a *Walton* analysis were available, the Nevada Supreme Court failed to provide "close appellate scrutiny" and therefore failed to cure the instructional error. Because we find the error not harmless under *Brecht v. Abrahamson*, we reverse the district court's dismissal of Valerio's petition as to the death penalty.

With respect to the guilt phase, we conclude that Ninth Circuit Rule 22-1 does not apply to Valerio's request for an expanded COA as to claims 4-8, 10-12, and 16-25. We therefore grant an expanded COA as to those claims. We reverse the district court's dismissal of claims 16(h), 17(m) and 25 for abuse of the writ; reverse its dismissal of claims 4-8, 10-12, 16(b)-16(e), 16(g), 16(j)-16(l), 16(n)-16(p), 16(t)-16(w), 16(z), 16(aa)-16 (kk), 17(a), 17(c), 17(e)-17(i), 17(k), and 18-24 for procedural default; and remand all these claims to the district court for appropriate consideration.

Should the district court deny or dismiss Valerio's guilt-phase claims after appropriate consideration, we instruct the district court to grant the writ as to the death

sentence unless, within a reasonable time, the state either grants a new penalty-phase trial or vacates the death sentence and imposes a lesser sentence consistent with the law. We also instruct the district court to grant such interim relief as may be appropriate during the pendency of further guilt-phase habeas proceedings.

REVERSED and REMANDED with instructions.

FISHER, Circuit Judge, Concurring:

Because neither party raised the application of *Walton v. Arizona*, 497 U.S. 639 (1990), to "appellate factfinding" when the penalty-phase factfinder was a jury, and resolution of that issue is not necessary for our conclusion, I concur in the opinion of Judge Fletcher except section II(C)(1).

RYMER, Circuit Judge, with whom Circuit Judges O'SCANNLAIN, T.G. NELSON, and GRABER join, Dissenting:

Today the majority reaches a claim that should not be reached - whether the Nevada Supreme Court could or did cure the "depravity of mind" aspect of the "torture, depravity of mind and mutilation" aggravating circumstance - and holds, without warrant, that a state supreme court may not apply a narrowing construction to an unconstitutionally vague instruction and determine that it is supported by the evidence as applied, when the penalty-phase factfinder is a jury instead of a judge.

Neither this issue nor its companion, whether substantial evidence supports the aggravator, should be reached because the effect of the court's *other* decision - to

treat Valerio's briefing as a request for a broadened Certificate of Appealability (COA), and to grant that request - is to revive a number of guilt-phase claims. Some of these claims are unexhausted. This means that Valerio's petition is now a mixed petition, subject to dismissal under *Rose v. Lundy*, 455 U.S. 509, 522 (1982). The majority recognizes this in its remand of *remaining* claims, noting that the petition must be dismissed (or stayed) if unexhausted claims are not dropped. But if the petition is mixed, it is mixed for *all* claims, not just *some* of them. The aggravating circumstance claim also should not be reached because it is a sentencing issue that may go away given reinstatement of substantial guilt-phase claims. While we *may* decide a sentencing issue first, we do not *have* to and, in my view, the court should *not* do so particularly where (as here) the issue involves an important question of constitutional law that affects how state appellate courts review state court judgments.

Beyond this, the majority's holding that a state appellate court lacks authority to cure an unconstitutional instruction by a narrowing construction whenever the sentence is determined by a jury is simply wrong. *Clemons v. Mississippi*, 494 U.S. 738 (1990), says that an appellate court has that authority and nothing said in *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds by Ring v. Arizona*, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), is to the contrary. Nor, if I had to get there, do I believe that the Nevada Supreme Court failed to scrutinize this case closely enough; while its analysis may not be perfectly articulated, I respect that court's citation to its own precedent, *Robins v. State*, 798 P.2d 558 (Nev. 1990), which indicates to me that the court applied a narrowing construction and determined that the evidence supplied a cogent basis for the jury's finding of the aggravating circumstance limited in scope to the permissible construction.

I therefore dissent both from the discussion, and the decision, in Part II.

I would also come out differently on whether to treat Valerio's briefing as a request to broaden his COA. However, unlike the decision on the constitutional issue, the decision on this question is quite limited because it can only apply to petitioners who appear to have been caught in the middle during the six months between our decision on June 23, 1998, in *United States v. Cruz-Mendoza*, 147 F.3d 1069 (9th Cir. 1998) (*Cruz-Mendoza I*), and the effective date of Circuit Rule 22-1(d), January 1, 1999. Still, I disagree that Valerio was actually caught in the middle. He does not purport to have relied on *Cruz-Mendoza I*, nor could he have. Nothing had happened in Valerio's appeal as of December 31, 1998, when *United States v. Cruz-Mendoza*, 163 F.3d 1149 (9th Cir. 1998) (*Cruz-Mendoza II*), amended the opinion in *Cruz-Mendoza I* in light of Rule 22-1(d). Valerio was then on notice that briefing would no longer be treated as a request for a broadened COA and that Rule 22-1(d), which states that the court of appeals will not consider uncertified issues unless a request for broadened certification is made and granted, had been adopted to clarify the procedure that would apply to COAs which had been partly granted and partly denied by the district court. Although the thirty-five day period provided in the Rule for making such a request had passed, prospectively Valerio had plenty of time to request a broadened certificate after *Cruz-Mendoza I* was withdrawn and Rule 22-1(d) became effective the first of the year, and before his brief was filed on May 12, 1999. As *United States v. Zuno-Arce*, 209 F.3d 1095 (9th Cir. 2000), *amended by* 245 F.3d 1108 (9th Cir. 2001), reasons similarly, I would not overrule it. Accordingly, I dissent from Part III as well.

I

A

In my view, the majority's opinion puts the cart before the horse by starting with Valerio's claim arising out of the "torture, depravity of mind, or mutilation of the victim" aggravating circumstance found by the jury. Instead, given the way the majority answers it, the foundational question turns out to be whether a broadened COA should be granted, because a mixed petition is created by virtue of its answer. We should not review a mixed petition on the merits.

The district court denied three of Valerio's claims outright and granted a COA on each. Valerio pursues two of these claims on appeal (Claim 14, vague instruction on aggravating circumstance in penalty phase; and Claim 15, insufficiency of the evidence of torture and mutilation). The district court also dismissed a number of claims on the ground of abuse of the writ or procedural default. It denied a COA as to these rulings, however the majority broadens Valerio's COA to include them. Having granted the COA, the majority reverses the district court's procedural rulings and remands for the district court to resolve the affected claims on the merits. But three of these claims are unexhausted. The majority recognizes that its decision to reverse the district court's procedural rulings has produced a mixed petition under *Rose v. Lundy*, and that the district court must dismiss or stay the petition unless the unexhausted claims are deleted. *See* op., *supra* at 14105 and 14109-10. Nevertheless, it reaches and resolves the merits of the aggravating circumstance claim, which is part of the same petition.

Because there are parts and subparts to contend with, it is easier to illustrate the problem by supposing a petition

that consists of Claims A, B and C. Claim A is exhausted, was resolved on the merits, and is certified by the district court. Claims B and C were dismissed on procedural grounds, but the procedural rulings are not certified; substantively, Claim B is not exhausted although Claim C is. There is no mixed petition at this point because Claims B and C are out of the picture. On appeal, we grant a broadened COA as to Claims B and C and reverse the district court's procedural rulings. Claims B and C are now revived on the merits. Because Claim B is not exhausted, the petition is mixed. The mixed petition includes Claims A, B and C - not just Claims B and C. All of them must be dismissed or stayed while Claim B is exhausted, unless Claim B is dropped.

I realize that exhaustion is not jurisdictional, and that courts of appeals may review the merits of a petitioner's claim in unusual circumstances even though some claims are unexhausted. However, exceptions to the general rule exist primarily when the state has waived the exhaustion requirement or when the unexhausted claim lacks merit and can easily be resolved. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 684 (1984) (exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional; there, unexhausted claim lacked merit); *Granberry v. Greer*, 481 U.S. 129, 135-36 (1987) (nonexhaustion defense is waivable; there, it wasn't raised until appeal and in that event court should determine whether interests of justice would be better served by addressing merits or requiring additional state proceedings); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 142 (9th Cir. 1993) (noting jurisdiction to consider unexhausted claims in mixed petition if claims "clearly do not rise to the level of alleged deprivations of constitutional rights") (quoting James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 9.3(b), at 122 (1988)). There is no recognized exception for reviewing one among several

exhausted claims, just because it may have merit or has been certified. Otherwise, if one of several exhausted claims could be resolved even though the petition is mixed, the rule requiring dismissal of mixed petitions would be meaningless. That is the case here: a single, exhausted issue has been cherry-picked for review on the merits. Moreover, the favored issue has considerable constitutional importance and raises serious federalism concerns. It is not dispositive and does not dictate the outcome of remaining claims (even as to sentencing, for there is an unresolved claim that appellate counsel was ineffective in failing to raise the aggravating circumstance issue on direct appeal). In short, the petition is mixed and *all* claims must be remanded for dismissal, stay, or deletion.

A second reason that I would not review the aggravating circumstance issue is that it is a sentencing issue that we may never have to deal with. Among other things, Valerio's guilt-phase claims challenge the effectiveness of both trial and appellate counsel, the prosecutor's compliance with *Brady v. Maryland*, 373 U.S. 83 (1963), and prejudicial admission of evidence, all of which the majority regards as making a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). If Valerio prevails on any one of them, his conviction would be invalidated and sentencing issues avoided. In these circumstances, it makes a good deal of sense to defer consideration of sentencing issues until issues relating to the conviction are settled. We have done so before, *see, e.g., Fields v. Woodford*, 281 F.3d 963, 981 (9th Cir. 2002), and I believe that we should do so now. Prudence, in addition to *Rose v. Lundy*, counsels in favor of restraint in these circumstances.[59]

---

[59] This is so whether or not we have worked on the issue, for advisory opinions are to be avoided even at the cost of a "colossal waste of time." *See* op., *supra* at 14109.

Third and finally, I would not consider the aggravating circumstance claim as posed by the majority, because the parties never developed the issue in the way that the majority frames and decides it.

B

Valerio does not argue that "*Walton* appellate factfinding [is] unavailable when [the] penalty-phase factfinder was a jury," op., *supra* at 14087; indeed, Valerio acknowledges that under *Walton v. Arizona*, 497 U.S. 639 (1990), *Lewis v. Jeffers*, 497 U.S. 764 (1990), and *Maynard v. Cartwright*, 486 U.S. 356 (1988), a vague aggravating circumstance may survive a constitutional challenge where a sufficiently narrow construction is adopted and applied by a state appellate court.[60] Instead, he contends that the state courts did not cure the unconstitutional impact of the vague aggravator in his case because there was insufficient evidence of torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself to avoid the unconstitutional application of the vague aggravator; the Nevada Supreme Court and the federal district court failed to apply the narrowing construction to the aggravator such that it remains

[60] Amicus takes a position closer to that adopted by the majority, as it argues that no Nevada court can make the finding of an aggravating circumstance in place of the jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). It also suggests that we could so hold on collateral review because *Apprendi* is a "watershed" rule, something we have since held we cannot do. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002). However, an issue raised only by an amicus, not by the parties, is not properly before the court. *Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995); *Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998) ("We do not review issues raised only by an amicus curiae."). In any event, the argument is not developed beyond the proposition just asserted, and no meaningful response has been addressed to it.

unconstitutionally vague; the Nevada Supreme Court has inconsistently applied its limiting construction; and the state supreme court lacked authority under state law to make the findings necessary to uphold the sentence of death or the aggravating circumstance upon which it is based. These arguments can be addressed summarily.[61] However, the majority ventures out on its own to hold (a) that neither *Walton* nor any other authority allows a state appellate court to apply a narrowing construction to an unconstitutional instruction when the penalty-phase factfinder is a jury; and (b) that even if *Walton* could be used to cure an unconstitutionally vague aggravating-circumstance jury instruction, the Nevada Supreme Court did not do its job right by providing "close appellate scrutiny."

I would not go on this venture at all but, were I to, I would question each step of the way.

1

The majority assumes that *Walton* controls,[62] but

---

[61] Given the evidence of how and where Valerio stabbed the victim, a rational factfinder could have found that she was subjected to torture and/or serious physical abuse. Valerio's argument that the repeated blows show panic or frenzy lacks any support in the record. Whether the Nevada Supreme Court failed to apply the *Robins* limiting construction correctly is a matter of state law for which federal habeas corpus relief does not lie. *Jeffers*, 497 U.S. at 780. Likewise, the Nevada Supreme Court has held that it does not lack authority under state law to reweigh under *Clemons*. *See Canape v. State*, 859 P.2d 1023, 1034 (Nev. 1993). It follows that it does not lack authority to conduct a harmless error review. That's what it had done in other cases, *see, e.g. Robins*, 798 P.2d at 564; *Moran v. State*, 734 P.2d 712, 714-15 (Nev. 1987). And that's what it did here, determining that the evidence supports the existence of the aggravating circumstance as properly defined.

[62] Although the majority's opinion decides the issue on the assumption that *Walton's* analysis of appellate review of death sentences controls, its approach is inevitably influenced by the view,

characterizes *Walton* as offering a different way (in addition to reweighing and harmless error review that the Supreme Court sanctioned in *Clemons*) for a state appellate court to affirm a death sentence after providing a narrowing construction of an aggravating circumstance. The opinion describes this as "*de novo* factfinding." Op., *supra* at 14088. But I don't think so. Rather, *Walton* simply carries forward the *Clemons* options for a state appellate court when faced with an unconstitutionally vague aggravator: either determine whether the existence of the aggravating circumstance as properly defined is supported by the evidence - i.e., harmless error review - or reweigh. *Walton*, 497 U.S. at 653-54 (so stating, citing *Clemons*).[63]

For this reason alone the majority's conclusion that *Walton* does not extend to jury determinations cannot stand, because that conclusion necessarily depends on the

---

which it also offers, that this aspect of *Walton* "is invalid under the rationale of *Ring*[.]" Op., *supra* at 14084 n.6. However, *Ring* makes clear that it overrules *Walton* only "in relevant part." *Ring*, 122 S. Ct. at 2432. The part that *Ring* overrules is the part that upheld Arizona's capital sentencing scheme on the footing that facts found by the judge qualified as sentencing considerations rather than as elements of the offense of capital murder. *Ring* found that this part of *Walton* is incompatible with *Apprendi*. But *Ring* does *not* overrule *Walton* to the extent that *Walton* has to do with appellate review of death sentences. *See Ring*, 122 S. Ct. at 2437, n.4. Overruling *this* part of *Walton* is for the Supreme Court to do, not for us. Meanwhile, *Walton's* holding that a state appellate court may limit and save an unconstitutionally vague aggravating circumstance, and itself determine whether the evidence supports the existence of the aggravating circumstance, is alive and well. *See Walton*, 497 U.S. at 653-54.

[63] We can put reweighing aside here, because there was nothing for the Nevada Supreme Court to reweigh. It did not toss out any aggravating circumstance, rather it upheld the aggravating circumstance that the jury found (the murder involved torture, depravity of mind, or mutilation) by narrowing it to torture and/or physical abuse. Thus, it engaged in harmless error review.

premise that *Walton* permits de novo "appellate factfinding." But harmless error analysis - although it assumes an independent review of the record - is not de novo factfinding. Rather, a state appellate court's affirming a death sentence after the jury has been instructed to consider an invalid factor simply determines that the result would have been the same had the aggravating circumstance been properly defined. *Stringer v. Black*, 503 U.S. 222, 230 (1992); *Clemons*; 494 U.S. at 754. This, as the Court put it in *Clemons*, is "a routine task of appellate courts." *Clemons*, 494 U.S. at 748-49.

The majority's conclusion also cannot stand on its other central premise - that a state appellate court's ability to cure instructional error in an aggravating circumstance stems only from *Walton*. It does not. It also stems from *Clemons*, *Maynard*, and *Godfrey v. Georgia*, 446 U.S. 420 (1980). Read together, these opinions make it clear that state appellate courts may cure unconstitutionally vague aggravating circumstances whether the error occurred in a judge's decision, or in a jury instruction.

The petitioner in *Godfrey* was sentenced to death by a jury based on a verdict finding that the offense of murder was "outrageously or wantonly vile, horrible and inhuman." The aggravating circumstance permitted a person to be sentenced to death if the jury found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Even though the Georgia Supreme Court had previously upheld death sentences based on the presence of torture or an aggravated battery, in this case it affirmed solely on the basis of the jury's finding that the offense was "outrageously or wantonly vile, horrible and inhuman." The United States Supreme Court held that this application of the aggravating circumstance was

unconstitutional, because a finding that a murder was "outrageously or wantonly vile, horrible and inhuman" is standardless and unchanneled. It reversed because the jury's uncontrolled discretion was "in no way cured by the affirmance of those sentences by the Georgia Supreme Court." *Godfrey*, 446 U.S. at 429. In so holding, the Court noted that the circumstances of the case did not satisfy the criteria previously outlined by the Georgia Supreme Court (torture and aggravated battery), that the Georgia Supreme Court did not take a different view of the evidence, and that the Georgia Supreme Court could not be said to have applied a constitutional construction of the remaining phrase in the aggravator, involving depravity of mind, because the petitioner's crimes did not reflect a consciousness materially more "depraved" than that of any other person guilty of murder. Thus, the Supreme Court did not reverse because the state appellate court *could not cure* an unconstitutional aggravating-circumstance instruction, but because it *did not*; "that court failed to apply its previously recognized limiting construction of the aggravating circumstance." *Maynard*, 486 U.S. at 363 (explaining what went wrong in *Godfrey*).

Much the same thing happened in *Maynard*. It, too, involved a jury determination of the death penalty based on three aggravating circumstances. The language of one of them - "especially heinous, atrocious, or cruel" - gave no more guidance than the language that the jury returned in its verdict in *Godfrey*. The Oklahoma Supreme Court concluded that the jury's verdict that the murder was especially heinous, atrocious or cruel was supportable, but the United States Supreme Court reversed because the state appellate court made no attempt to cure the constitutional infirmity of the aggravating circumstance. *Maynard*, 486 U.S. at 364. Again, the Court did not fault the process. *Id.* at 365 (noting that since the state supreme court's decision, the Oklahoma appellate courts had

restricted the aggravating circumstance to those murders in which torture or serious physical abuse is present). Nor did it intimate in any way that an appellate court could not cure the constitutional infirmity of the aggravating circumstance simply because it had been found by a jury.

Clemons was also a jury case. Clemons argued that it was constitutionally impermissible for an appellate court to uphold a death sentence imposed by a jury that has relied in part on an invalid aggravating circumstance. This is basically the same proposition that the majority accepts, but the Supreme Court rejected. The Court held that an appellate court may weigh the valid aggravating circumstances against mitigating circumstances without the assistance of written jury findings, or it may find that the error which occurred during the sentencing process was harmless. *Clemons*, 494 U.S. at 748-54. In *Clemons* itself, the Court could not tell what the Mississippi Supreme Court intended by its harmless error analysis. But the Court made clear that harmless error analysis is available, and that it is possible for a state appellate court to determine that the failure to instruct properly on an aggravating circumstance was harmless error if the result would have been the same had the aggravating circumstance been properly defined. *Id.* at 754 & n.5 (emphasizing that in *Johnson v. State*, 486 U.S. 578 (1988), where the Mississippi Supreme Court had decided to remand to a sentencing jury, the United States Supreme Court "did not hold that the Mississippi Supreme Court could not have applied harmless-error analysis").

Walton says nothing to the contrary. The majority infers that *Walton* cannot be used to cure an unconstitutionally vague aggravating-circumstance jury instruction from the fact that the Supreme Court "found" *Maynard* and *Godfrey* "not controlling" because the death sentences in those cases had been imposed by juries. Op.,

supra at 14086-87.[64] That's true, so far as it goes, but misses the point of the discussion in *Walton*. There, the trial judge found two aggravating circumstances, that the murder was "especially heinous, cruel, or depraved," and that it was done for pecuniary gain. The Arizona Supreme Court had previously given a narrowing construction to "especially heinous, cruel, or depraved," but the trial judge's finding that the special circumstance existed was articulated only in the vague statutory language. The petitioner argued that this failed to pass constitutional muster for the same reasons that the Court found Oklahoma's and Georgia's aggravating circumstances invalid in *Maynard* and *Godfrey*. The Supreme Court disagreed. It explained that the two prior cases were different because in both, the jury was instructed only in the bare terms of the statute *and* "in neither case did the state appellate court, in reviewing the propriety of the death sentence, purport to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented." *Walton*, 497 U.S. at 653. In other words, if a jury is the factfinder and is improperly instructed in the bare terms of a vague aggravating circumstance, the death sentence has to be reversed *unless* the state appellate court itself determines that the evidence supports the existence of the aggravating circumstance as properly defined. However, judges (unlike jurors who have to be instructed on the law) are

---

[64] The text from *Walton* upon which the majority relies states:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*. *But the logic of those cases has no place in the context of sentencing by a trial judge.*

Walton, 497 U.S. at 653 (emphasis added by the majority).

presumed to know and to apply an aggravating circumstance according to its valid, judicially narrowed definition. Thus, if the state appellate courts have adopted a narrowing construction of the aggravating circumstance, as the Arizona Supreme Court had done with respect to "especially cruel," neither reversal nor cure is required regardless whether the statutory definition is vague when a judge makes the finding rather than a jury. But even if a judge fails to apply a narrowing construction or applies an improper construction, the Court indicated that reversal is still not required because the state appellate court may nevertheless cure that error just as *Clemons* provides. Put differently, *Walton* does not take *Clemons* review away when the factfinder is a jury; it extends it to a judge when the judge acts like a jury by finding an aggravating circumstance that is based on a constitutionally wrong interpretation of law.

If there were any doubt whether *Walton* left appellate courts able to salvage a death sentence based in part on an invalid aggravating circumstance when the penalty phase factfinder is a jury (which I don't think there is), *Stringer*, which came down after *Walton*, should dispel it. *Stringer* also involved a jury finding based on an invalid aggravating factor and it also acknowledges the availability of an appellate cure by way of harmless error analysis. *Stringer*, 503 U.S. at 230 (noting that "[i]n order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor").

Nor does *Pertgen v. State*, 875 P.2d 361 (Nev. 1994), *abrogated on other grounds by Pellegrini v. State*, 34 P. 3d 519 (Nev. 2001), upon which the majority relies, support its conclusion that a state appellate court may not cure an unconstitutionally vague aggravating circumstance found

by a jury, or indicate that "[t]he Nevada Supreme Court itself now agrees that the *Walton* appellate factfinding procedure is not available when the penalty-phase factfinder was a jury," as the majority says that it does. Op., *supra* at 14087. After observing in the passage cited by the majority that *Walton* is distinguishable because a judge is presumed to know the law and apply it constitutionally, whereas Pertgen's death sentence was imposed by a jury which is supposed to be correctly instructed,[65] the Nevada Supreme Court went on to state:

> Our inquiry does not end at this juncture, however. In *Clemons v. Mississippi*, the United States Supreme Court confirmed that reweighing and harmless error analyses, though not required, are constitutionally permissible under appropriate circumstances. Likewise, it is permissible for us to remand for resentencing when the circumstances necessitate such action. We have elected to follow each of these alternatives under appropriate circumstances.

Pertgen, 875 P. 3d at 366 (internal citations omitted). Thus, all that the Nevada Supreme Court did in *Pertgen* was to recognize that it has discretion to cure or to remand. While the United States Supreme Court has said that state appellate courts *may* cure an unconstitutionally vague aggravating circumstance found by a jury, of course it has never said that state appellate courts *must* do so. *See Clemons*, 494 U.S. at 754 n.5 (noting that harmless error

---

[65] The text from *Pertgen* upon which the majority relies is as follows: Although the Court [in *Walton*] upheld the imposition of a death sentence, *Walton* is factually distinguishable from the present case. In *Walton*, the death sentence was imposed by a trial judge, who is presumed to know the law and to apply it in a constitutional manner. By contrast, in this case the death sentence was imposed by a jury. *Pertgen*, 875 P.2d at 366.

analysis is alternative to remand). Rather than line up with the majority's view of *Walton*, the *Pertgen* court actually performed a harmless error analysis but concluded that the error in Pertgen's case wasn't harmless beyond a reasonable doubt.

Be this as it may, the majority has now held that *Walton* does not allow a state appellate court to apply a narrowing construction to an unconstitutional instruction when the penalty phase factfinder has been a jury. To me, this breaks new ground. Therefore, in addition to everything else, today's decision implicates *Teague v. Lane*, 489 U.S. 288 (1989), because it announces a new rule in a federal habeas corpus proceeding.

For all these reasons, I would not reach the issue whether the Nevada Supreme Court could cure the "torture, depravity of mind and mutilation" aggravating circumstance, but if forced to, I would hold that the Nevada Supreme Court could apply a narrowing construction to the unconstitutionally vague instruction in this case and determine that the aggravating circumstance found by the jury is supported by the evidence as applied.

2

Alternatively, the majority holds that the Nevada Supreme Court failed to give "close appellate scrutiny" to its application of the narrowing definition that it adopted for the "torture, depravity of mind and mutilation" aggravating circumstance. This comes from *Stringer*, which requires "close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." *Stringer*, 503 U.S. at 230. While it may have been more helpful had the Nevada Supreme Court's analysis

been more detailed, this is not a complicated case and I have no trouble understanding what the court did and why.

I assume by its citation to *Robins* that the Nevada Supreme Court considered and rationally applied its own recent precedent. Thus, the court concluded that the "torture, depravity of mind and mutilation" aggravating circumstance was not based solely upon a "depravity of mind" aspect as it was in *Godfrey*, but also on torture and serious physical abuse. Nevada's aggravating circumstance contains such limiting language and is construed "as requiring torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to an aggravating circumstance based in part upon depravity of mind."[66] *Robins*, 798 P.2d at 570. The evidence supplied "a cogent basis" for the jury's finding of the aggravating circumstance limited in scope by this construction. The reason is: "evidence that Ms. Blackwell was stabbed more than forty-five times, had 'defensive wounds' on her hands and arms, and died not from one wound but from all wounds combined, satisfies us that she was subjected to torture and/or serious physical abuse before she died." Order Dismissing Appeal at 1 n.2 (Nev. S. Ct. Jan. 24, 1992). This shows me that the Nevada Supreme Court conducted an independent review of the evidence and concluded that the aggravating circumstance instruction was not unconstitutionally vague as applied.

---

[66] Ever since *Robins*, the Nevada Supreme Court has construed NRS 200.033(8) as an aggravating circumstance where the murder involves torture or serious physical abuse, a term that it uses synonymously with mutilation. *See, e.g., Jones v. State*, 817 P.2d 1179, 1181 (Nev. 1991) (before decision in *Valerio); see also Smith v. State*, 953 P.2d 264, 266 n.3 (Nev. 1998) (indicating Nevada Supreme Court practice since *Robins).*

While reasonable minds can certainly disagree about the disposition's clarity, I question how the state's highest court can fall short of "close" appellate scrutiny simply by stating that it "agreed" with the trial judge that the murder involved "torture (or serious physical abuse)" when the trial judge had only discussed torture, and that it was "satisfied" that this is what the evidence showed. Op., *supra* at 14090. I should think it unremarkable that torture encompasses "serious physical abuse" when, as here, the victim was stabbed forty-five times by a knife, mostly in patterns of eight, on targeted parts of her body.[67] Nor would I fault the Nevada Supreme Court for stating that the evidence "satisfies us" that the victim was subjected to torture and physical abuse. Op., *supra* at 14089-90. It is *supposed* to be satisfied that the evidence supports the existence of the aggravating circumstance as properly defined. *See Walton*, 497 U.S. at 654 (citing *Clemons*). Nothing in the Constitution requires us to disturb that conclusion. While the court could have said "convinces us" or it could have said "persuades us sufficiently," I am satisfied that the Nevada Supreme Court believed that torture and/or serious physical abuse had been proved. While it also could have said "beyond a reasonable doubt," I do not doubt that the state's highest court knows what

---

[67] The majority makes much of the fact that the state declined to argue that Valerio subjected the victim to *torture*, but that can't make a difference because the prosecutor's focus was on *mutilation*. His closing argued: "We have a body here, the body of Karen Sue Blackwell, which had 45 knife wounds, three, I can't remember the number, some abrasions to the top of the head. This body was mutilated, was it not from the top of the head to the vaginal area. That body was mutilated, pure and simple. That must be the definition of mutilation." Defense counsel likewise focused on mutilation, arguing: "Is it a mutilation worse than others? Well, this certainly is worse than you have in some murders, yeah. It's not one gunshot wound. It's also not as bad as you have in some other cases. So you have to decide. No limbs were cut off. It's not one of those cases where you read in the paper the head was found separated from the body. It's not one of the cases where you find words carved in the body. Is it mutilation? You have to decide."

the standard is in a criminal case. Finally, it is hard for me to understand the majority's quarrel with the Nevada Supreme Court's conclusion that the victim was tortured or seriously physically abused even though she wasn't killed by the first stab but from all forty-five of them. To me, stabbing a person forty-two or-three or-four times more than necessary to kill is not at all inconsistent with the narrowed version of the instruction that requires abuse "beyond the act of killing itself." But regardless, how Nevada interprets its own limiting construction is a matter of state law that is not cognizable on federal habeas review. *See Jeffers*, 497 U.S. at 780. Therefore, whether we think it is a sensible view of state law, or not, is immaterial.

In any event, the majority has concluded that the Nevada Supreme Court fell short of the mark. Having done so, I would be guided by what the Supreme Court did in *Richmond v. Lewis*, 506 U.S. 40 (1992). There, it held that the Supreme Court of Arizona did not cure a sentencing judge's error in giving weight to an unconstitutionally vague aggravating factor because two justices who concurred in affirming the sentence did not actually perform a new sentencing calculus, as required for reweighing. The Court returned the case to the district court "to enter an order granting the petition for a writ of habeas corpus unless the State of Arizona within a reasonable period of time either corrects the constitutional error in petitioner's death sentence or vacates the sentence and imposes a lesser sentence consistent with law." *Id.* at 52. Similarly, if the only deficiency is that the Nevada Supreme Court failed to give close enough scrutiny to satisfy this court, Nevada courts should have another crack at doing so.

Assuming that I got there, my own harmless error determination would also differ from the majority's. The majority opts to apply the harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (substantial and injurious effect or influence) because of its view that the *Walton* analysis is unavailable. I would follow the Supreme Court's direction in *Jeffers* to adhere to the *Jackson v. Virginia*, 443 U.S. 307 (1979), rational factfinder standard. *Jeffers*, 497 U.S. at 781. Also, Valerio concedes that *Jackson* is the applicable standard. Either way, I cannot say that the Nevada Supreme Court got it wrong or that any rational factfinder would have found anything but torture or serious physical abuse (mutilation). In short, the error was harmless.

Karen Blackwell was twenty-seven years old when she went to Valerio's house on September 19, 1986. Ten days later, her partially clothed body was found in the back seat of a car parked at a Las Vegas apartment complex.

Blackwell had been stabbed forty-five times, had blunt trauma lacerations to the right side of the head, and had "defensive" wounds or cuts in the left upper arm, and right hand. Most of the wounds occurred in groups of eight. There were eight stab wounds on the top of her head, in a cluster of about two inches. These wounds penetrated the skin but did not go into the skull. Blackwell was stabbed eight times on the front of her neck, again in a small cluster, and eight times in a cluster on the back of her neck. Valerio also stabbed Blackwell eight times (in an arc) in the right breast, and eight times in the left breast. Then there were three stab wounds in the abdomen, leading down to one stab wound in the vaginal area.

When found, Blackwell's body was wrapped in Valerio's bedding. Blood was found in Valerio's bedroom. Blackwell's keys and an address book with her name and

phone number were in the pockets of Valerio's jacket (seized in a search of his house).

Based on this evidence, I would hold that a rational factfinder could have found that Valerio subjected Blackwell to torture or serious physical abuse. *See, e.g., Jones v. State*, 937 P.2d 55, 68 (Nev. 1997) (evidence of thirty-five wounds, including a cluster of seven to the victim's right breast, is mutilation). Neither do I have any doubt that any reasonable juror who heard the testimony and saw the exhibits would find otherwise. Therefore, in my view, the Nevada Supreme Court could reasonably have concluded that the offense Valerio committed involved torture or serious physical abuse beyond the act of killing itself, and its conclusion is rationally supported by the evidence.

II

I also part company with the majority's approach to broadening the Certificate of Appealability. The chronology shows why Valerio's briefing should not count as a request to expand his COA, so I recite it completely.

Since April 24, 1996, appeals from dismissal of habeas corpus petitions have been governed by the certificate of appealability requirements of AEDPA. 28 U.S.C. § 2253(c). However, AEDPA simply provides that an appeal may not be taken from a final order in a habeas corpus proceeding unless "a circuit justice or judge" issues a COA that indicates the specific issues upon which the petitioner has made a substantial showing of the denial of a constitutional right. We decided early on that requests for a COA could be made in the first instance to the district court, *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997), and 1998 amendments to Rule 22(b) of the Federal Rules of Appellate Procedure, effective December 1, 1998,

assumed the same thing. Amended Rule 22(b)(1) also provided that, "[i]f the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate." But there was no specific provision in statute or rule for what should happen when the district court grants a COA in part and denies it in part.

We first considered how to treat such cases in *Cruz-Mendoza I*. The petitioner there had filed a § 2255 petition, which the district court denied. He sought a COA in the district court on all issues, but it was not granted on one of them. He did not separately request a COA from a motions panel of our court on the uncertified issue, but briefed it and requested in his opening brief that a COA be granted. We held that, "in the interest of efficiency, where a district judge has issued a COA on some but not all of the issues, we will treat the briefing of an uncertified issue as a request for a COA and first decide whether one should issue." *Cruz-Mendoza I*, 147 F.3d at 1074 (footnote omitted). This decision was rendered on June 23, 1998.

The district court dismissed Valerio's § 2254 petition on August 19, 1998. He filed a notice of appeal September 18, 1998, and on October 15, 1998, the district court granted a COA as to Ground 14 (vague instruction on aggravating circumstance in penalty phase) and Ground 15 (insufficiency of the evidence on torture and mutilation) but otherwise denied it.[68]

The scenario in *Cruz-Mendoza I* highlighted the need for a procedure to handle situations where the district court partly denies a request for a COA. After a three-month period of notice and comment, Circuit Rule 22-1(d) was adopted in December 1998 to deal with the problem. It had an effective date of January 1, 1999. Rule 22-1(d)

[68] The court also granted a COA on a third ground, but Valerio does not pursue it on appeal.

states that the "court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification." It then tells petitioners that those desiring broader certification must file a separate motion, with reasons, within thirty-five days of entry of the district court's order denying a COA. Valerio does not dispute that he had notice of the Rule.

Stating that Rule 22-1(d) was intended to clarify how cases should be handled in which the district court had declined to certify some of the issues, the *Cruz-Mendoza* panel amended *Cruz-Mendoza I* on December 31, 1998. *Cruz-Mendoza II* deleted that part of *Cruz-Mendoza I* which had held that when a district judge has issued a COA on some but not all issues, briefing of an uncertified issue would be treated as a request for a COA. *Cruz-Mendoza II*, 163 F.3d at 1149.

Valerio requested and received a number of extensions after January 1 for filing his opening brief on appeal. However, he did not request that the COA be broadened. He filed his opening brief May 12, 1999. The brief does not request a COA on uncertified issues, but discusses them.

In its answering brief the state asserted that Valerio's arguments with respect to procedural default and abuse of the writ should not be considered because they were not certified. Valerio responded that he had made these arguments in the district court, hence it would not be unfair to the state for them to be considered by this court; that AEDPA is inapplicable to his petition; and that regardless, he could show the denial of a constitutional right so he meets the AEDPA standard.

After oral argument, the panel provided the parties a tentative decision and an opportunity to respond to it. The tentative disposition indicated that AEDPA applies to the

petition, and that the court would not reach uncertified issues on which Valerio had failed to request a broadened COA. Valerio's response did not mention or challenge the refusal to consider uncertified issues. Nor did Valerio's response request that the COA be expanded.

After the decision was filed, Valerio filed a petition for rehearing which argued for the first time that as of October 16, 1998, when the district court granted in part and denied in part his request for a COA, this court allowed a petitioner to brief uncertified issues and to construe that briefing as a request for certification on those issues.[69] He pointed out that the thirty-five days allowed in the Rule would have expired on November 20, 1998 - before the Rule's effective date. In these circumstances, he contended that application of Rule 22-1(d) produces a harsh and unjustified result, and violates due process, by penalizing him for failing to comply with a rule that was not in existence at the time he would have been required to comply. However, Valerio did not indicate that he had relied on *Cruz-Mendoza I*, did not argue that *his* briefing should be construed as a request for certification, and did not request a broadened certification or give reasons why it should be granted.

Absent any request in any form, I do not believe that the court has any obligation sua sponte to determine if uncertified issues should be considered. Neither do I believe that it was impracticable for Valerio himself to make a request, and to give reasons, for broadening the certification. He knew that regardless of what we held in *Cruz-Mendoza I*, *Cruz-Mendoza II* indicated that as of December 28, 1998, this court would no longer consider the mere briefing of an issue as a request for an expanded

---

[69] Normally arguments raised for the first time in a motion to reconsider, that could have been raised before, are waived. *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995).

COA. This was four months before Valerio's opening brief was filed: *Cruz-Mendoza II* came down *December 31, 1998;* his opening brief was not filed until *May 12, 1999.* He could not possibly have relied on the *unamended* version of *Cruz-Mendoza,* and does not claim that he did. Neither does he claim ignorance of *Cruz-Mendoza II.* In short, Valerio had plenty of time to ask this court to consider uncertified issues, but never did.

Valerio has offered no explanation for failing to ask this court to consider uncertified issues. AEDPA requires a COA. He only obtained part of what he asked for from the district court. This court cannot review uncertified issues. So he had to get permission, somehow. AEDPA prescribes no particular procedure. *Cruz-Mendoza I* - which did - said that briefing would suffice, but it was withdrawn long before Valerio filed his brief.

Rule 22-1(d) replaced *Cruz-Mendoza I* and restates the obvious: a petitioner must seek permission to pursue uncertified issues from the court of appeals, and certification must in fact be granted. As we observed in *Hiivala v. Wood,* 195 F.3d 1098, 1103 (9th Cir. 1999), " § 2253 must limit appellate review to issues specified in the COA because, if it did not, allowing a habeas petitioner to raise uncertified issues would render meaningless the specification language of § 2253(c)(3)." In this respect, Rule 22-1(d) is a procedural device that opened an avenue for petitioners to seek a broader certification from the court of appeals that does not exist in AEDPA. The fact that Rule 22-1(d) also sets a time frame that had passed in Valerio's case when the Rule became effective does not shield him from the fundamental point that an issue has to be certified to be considered. The heart of the Rule is not the time limit; time limits are, after all, routinely extended and grace periods are allowed. The heart of the Rule is that "the court of appeals will not consider uncertified issues

unless petitioner first seeks, and the court of appeals grants, broader certification."

Neither this post-AEDPA reality, nor the timing requirements of Rule 22-1(d), attached new legal consequences to *anything* that Valerio had completed before it was enacted; *nothing* had been done on this appeal before Rule 22-1(d) became effective. The normal practice in these circumstances is to apply a procedural rule to pending cases when doing so is "just and practicable." *See, e.g.*, Order of April 23, 1996, West Federal Civil Judicial Procedure and Rules 442 (2002) (amendments to the Federal Rules of Appellate Procedure "shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending"); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994) (retroactive application of new procedural rules does not raise due process concerns where application is just and practicable); *Volkswagenwerk Aktiengesellschaft v. Church*, 413 F.2d 1126, 1127-28 (9th Cir. 1969) (same). Indeed, in *Hiivala*, 195 F.3d at 1103, we stated that "Circuit Rule 22-1 and the Advisory Committee Note became effective before this case was submitted for decision. It would appear, therefore, that we should apply the Rule to Hiivala's appeal." This is what we held in *Zuno-Arce*, and its reasoning is persuasive. *See Zuno-Arce*, 209 F.3d at 1100-01.

Applying the Rule is practicable. Although it certainly would have been impossible for Valerio to ask this court for a broader certification within thirty-five days of the district court's order because he did not know that he was supposed to, this changed as of December 31, 1998. As of then he knew for sure that he had to seek broader certification *apart from briefing*. Valerio suggests no reason why it was impracticable to do so. Instead, Valerio chose to ignore both *Cruz-Mendoza II* and this court's statement

in Rule 22-1(d) that it would not consider uncertified issues, and to brief uncertified issues anyway without, even then, acknowledging that the issues were uncertified or requesting that they be certified.

In these circumstances I do not believe that it is unjust to decline to treat briefing as the functional equivalent of a request to broaden the COA. That option was withdrawn four months earlier, and therefore could engender no expectations. Valerio and amicus now argue that injustice will result because the uncertified issues have merit. But this cannot be the proper measure, for then we would always consider issues that have been waived if they are meritorious but wouldn't if they aren't. This is not our practice. *See, e.g., Parrino v. FHP, Inc.*, 146 F.3d 699, 704 (9th Cir. 1998); *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).

The majority's focus on the absence of direction in Rule 22-1(d) to a petitioner in Valerio's position seems misplaced to me, for it leads them to conclude that it was not unreasonable for Valerio to assume that the Rule did not apply to him - particularly, as the opinion states, "given that, prior to the adoption of the Rule, *Cruz-Mendoza I* had specifically approved briefing to the court of appeals as a mechanism for seeking an expanded COA." Op., *supra* at 14101. However, I do not see how this can be so in light of the demise of *Cruz-Mendoza I* four months before Valerio's briefing was submitted.

In sum, Valerio made no request for a broadened COA. After *Cruz-Mendoza II*, there was no basis for him to assume that briefing would be treated as a request for broader certification. Valerio knew this. He has not offered any compelling reason why Rule 22-1(d) could not practicably and justly be applied to petitioners, such as he, who had submitted no briefing in reliance on *Cruz-*

Mendoza I. Far more than thirty-five days elapsed, even if Valerio's briefs should be treated as a viable request. Thus, for the reasons explained in *Zuno-Arce*, which I would not overrule, I would not consider the uncertified issues.

III

Conclusion

Although I would not reason as the majority does in granting a broadened COA, I appreciate why it feels impelled to do so. However, having broadened Valerio's COA to include all claims previously dismissed on procedural grounds, and having reversed the district court's ruling on abuse of the writ and state-court procedural default, the court has revived all of Valerio's guilt-phase claims including several that are unexhausted. The petition is now a mixed petition, which is subject to dismissal. I would not pick out one among many exhausted claims to make new constitutional law on, particularly when the claim that is singled out is a sentencing claim. There is no need to resolve whether the Nevada Supreme Court may, or did, cure an unconstitutionally vague aggravating-circumstance instruction unless and until it is determined that no writ shall issue on the guilt phase. But if the merits are reached, a state appellate court may salvage a jury's finding of an aggravating circumstance by a narrowing construction that applies to the facts of the case. The United States Supreme Court has said so repeatedly. Here, any rational factfinder could find that stabbing the victim forty-five times in clusters of eight on her head and neck and breasts and elsewhere was murder with torture or serious physical abuse. Accordingly, I would affirm the district court's denial of the writ.

Supreme Court, U.S.
FILED
MAR 17 2003
OFFICE OF THE CLERK

No. 02-1188 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

E.K. McDANIEL, Warden, Ely State Prison;
JACKIE CRAWFORD, Director, Nevada Department of Prisons;
BRIAN SANDOVAL, Attorney General of the State of Nevada, Petitioners,

v.

JOHN ESPIREDION VALERIO, Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, John Espiredion Valerio, asks leave to file the attached opposition to a petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Counsel for respondent was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3006A and 21 U.S.C. § 848(q). See Supreme Court Rule 39.1.

Dated this 17th day of March, 2003.

FRANNY A. FORSMAN
Federal Public Defender
For the District of Nevada

MICHAEL PESCETTA
Assistant Federal Public Defender
Counsel for Respondent

21 pp

No. 02-1188

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

E.K. McDANIEL, Warden, Ely State Prison;
JACKIE CRAWFORD, Director, Nevada Department of Prisons;
BRIAN SANDOVAL, Attorney General of the State of Nevada, Petitioners,

v.

JOHN ESPIREDION VALERIO, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

FRANNY A. FORSMAN
Federal Public Defender
For the District of Nevada
*MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, #700
Las Vegas, Nevada 89101
(702) 388-6577

LAWRENCE D. WISHART, ESQ.
313 Flint Street
Reno, Nevada 89501
(775) 348-2070

*Counsel of record

BEST AVAILABLE COPY

No. 02-1188

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

E.K. McDANIEL, Warden, Ely State Prison;
JACKIE CRAWFORD, Director, Nevada Department of Prisons;
BRIAN SANDOVAL, Attorney General of the State of Nevada, Petitioners,

v.

JOHN ESPIREDION VALERIO, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

FRANNY A. FORSMAN
Federal Public Defender
For the District of Nevada
*MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, #700
Las Vegas, Nevada 89101
(702) 388-6577

LAWRENCE D. WISHART, ESQ.
313 Flint Street
Reno, Nevada 89501
(775) 348-2070

*Counsel of record

QUESTIONS PRESENTED
[CAPITAL CASE]

1. When a Court of Appeals

   (1) follows this Court's uniform precedents, which hold that the adequacy of a state procedural bar to preclude federal review is a federal question, and

   (2) concludes, based on its review of the terms of the state court's published and unpublished decisions that the state court's imposition of its procedural bars is discretionary and not based on "clear, consistently applied and well established" rules that actually bind the court's actions,

   can granting certiorari be justified merely because a state court decision asserts that its past decisions consistently applied procedural rules?

2. When a Court of Appeals resolves procedural issues relating to abuse of the writ and procedural default, and concludes that review of the merits of some constitutional claims is not precluded, and some of those claims may be unexhausted, is the Court of Appeals required to ignore this Court's decision in Granberry v. Greer, 481 U.S. 129 (1987), which grants discretion to review petitions that are discovered to be mixed petitions on appeal, and to refuse to review any claims?

3. When a state appellate court in a weighing state upholds a death sentence despite a finding of an unconstitutional depravity aggravating factor, but the court does not conduct reweighing or harmless error review, as required by Richmond v. Lewis, 506 U.S. 40 (1992), Stringer v. Black, 503 U.S. 222 (1992), and Clemons v. Mississippi, 494 U.S. 738 (1990), can granting certiorari be justified to review the Court of

Appeals' decision vacating the sentence based on that factor?

4. When a Court of Appeals reverses a judgment in a habeas proceeding and remands for further proceedings, is it absolutely precluded from resolving a constitutional claim relating to the penalty phase solely because further proceedings on guilt phase issues may occur in the district court?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

CONCLUSION 13

TABLE OF AUTHORITIES

PAGE(S)

CASES

Bejarano v. State, 106 Nev. 840, 801 P.2d 1388 (1990) 5

Bejarano v. Warden, 112 Nev. 1466, 929 P.2d 922 (1996) 5

Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995) 5, 10

Clemons v. Mississippi, 494 U.S. 738 (1990) i

Coleman v. Thomson, 501 U.S. 725 (1991) 3

Delta Airlines v. August, 450 U.S. 346 (1981) 6, 7

Douglas v. Alabama, 380 U.S. 415 (1965) 4

Dugger v. Adams, 489 U.S. 401 (1989) 3, 4

Ford v. Georgia, 498 U.S. 411 (1991) 3

Ford v. Warden, 111 Nev. 872, 901 P.2d 123 (1995) 5

Godfrey v. Georgia, 446 U.S. 420 (1986) 1, 2, 8

Granberry v. Greer, 481 U.S. 129 (1987) ..... i, 7

Hicks v. Oklahoma, 447 U.S. 343 (1980) 12

Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) 5

Johnson v. Mississippi, 486 U.S. 578 (1988) 3, 4

Lankford v. Idaho, 500 U.S. 110 (1991) 11

Lee v. Kemna, 534 U.S. 362 (2002) 4

Lewis v. Jeffers, 497 U.S. 764 (1990) 4

Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) 4, 5

Pertgen v. State, 110 Nev. 554, 875 P.2d 361 (1994) 11

Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001) 3, 6

Powell v. Nevada, 511 U.S. 79 (1994) 7

Richmond v. Lewis, 506 U.S. 40 (1992) ..... passim

Ring v. Arizona, 536 U.S. 584 (2002) 12

Slack v. McDaniel, 529 U.S. 473 (2000) 2

Stringer v. Black, 503 U.S. 222 (1992) ..... passim

Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002) ..... passim

Valerio v. State, 112 Nev. 383, 915 P.2d 874 (1996) 4

Village of Willowbrook in Olech, 528 U.S. 562 (2000) (per curiam) 3

Walton v. Arizona, 497 U.S. 738 (1990) 9, 11

Youakim v. Miller, 425 U.S. 231 (1976) 6

STATUTES

28 U.S.C. § 2254(b)(2) 7

Nev. Const. Art. 6 § 4 12

Nev. Rev. Stat. § 200.033(8) 1

Respondent John Valerio submits the following brief in opposition to the petition for writ of certiorari filed by the petitioners representing the State of Nevada. Respondent accepts the characterizations made in the procedural sections of the state petition.[1]

STATEMENT OF THE CASE

Respondent John Valerio was sentenced to death in 1988 on the basis of findings of two aggravating factors under Nevada law, including a finding that the murder involved "torture, depravity of mind or mutilation of the victim." Nev. Rev. Stat. § 200.033(8) (emphasis supplied). The depravity portion of the aggravating factor was defined to the jury as "an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible and inhuman." The jury was not given any instruction defining torture or mutilation. CR 29, Ex. PP, instructions 7, 10. At trial, the prosecutor emphasized the depravity language of the instruction, and explicitly disclaimed any reliance on torture as a theory of the aggravating factor on the ground that there was no evidence of torture. CR 28, Ex. LL at 59-60.[2] Although Godfrey v. Georgia, 446 U.S. 420 (1986) had been decided two years before the trial, the unconstitutional vagueness of the depravity instruction was not objected to at trial or raised on direct appeal from the conviction and sentence. In the initial state habeas proceeding, the state district court rejected a

---

[1] There are no parties to this proceeding other than those named in the caption, but the petitioners represent the interests of the State of Nevada.

[2] The killing was committed by multiple stab wounds, but there was no evidence suggesting that the fatal wounds were inflicted for the purpose of causing pain rather than accomplishing the homicide. The only medical testimony presented by the state indicated that the cumulative effect of all the stab wounds was the cause of death and that there was no conclusion as to the timing of the wounds. CR 27, Ex. FF at 200-201.

challenge to the depravity factor under Godfrey, ruling that, under Nevada Supreme Court authority, the instruction was constitutional, and that the case "involved" torture, without reference to the state's explicit abandonment of the torture theory at trial. On appeal from the denial of relief, the Nevada Supreme Court affirmed. It agreed with the state district court's ruling that the aggravating factor was constitutional, concluded that the depravity factor required a showing of "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself" (emphasis supplied), and stated that the evidence showed the existence of "torture and/or serious physical abuse" (emphasis supplied). Respondent's Appendix A at 1 n.1. The court also ignored both the state's concession at trial that there was no evidence of torture and the evidence showing that the killing was accomplished by a combination of all of the stab wounds inflicted.

Following a second state habeas proceeding, in which the Nevada Supreme Court refused to review constitutional claims on procedural grounds, the federal district court reviewed respondent's habeas corpus petition and denied relief. A panel of the Court of Appeals initially affirmed the denial of relief, in part on procedural grounds relating to the certificate of appealability. The Court of Appeals granted rehearing en banc, and expanded the scope of the certificate of appealability to include all of the claims raised by respondent, an action of which the state does not complain in its petition for certiorari. The Court of Appeals reversed the district court's dismissal of some claims under the abuse of the writ doctrine, based on this Court's decision in Slack v. McDaniel, 529 U.S. 473 (2000); reversed the district court's dismissal of other claims on procedural default grounds, based on the inadequacy of the state default rule to bar federal review; and reversed the denial of relief as to the penalty, based on the invalidity of the depravity aggravating factor under Godfrey v. Georgia, 446 U.S. 420, 433 (1980). Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002)

en banc) The state now seeks certiorari.

REASONS FOR DENYING THE WRIT

1. This Court should not grant certiorari to review the Court of Appeals' unanimous en banc decision that the Nevada Supreme Court does not consistently apply its successive collateral petition default rule in capital cases: the Court of Appeals' decision properly follows the analysis required by this Court's precedents, and its conclusion is clearly correct.[3]

The Court of Appeals considered the adequacy of the Nevada Supreme Court's procedure in the analytical framework imposed by this Court's case law. 306 F.3d at 773, citing Johnson v. Mississippi, 486 U.S. 578, 587 (1988); Ford v. Georgia, 498 U.S. 411, 424 (1991); Coleman v. Thomson, 501 U.S. 725, 735 (1991). It concluded, as it had in the previous Petrocelli decision, that the Nevada successive petition rule was not consistently applied and therefore was not adequate to bar federal review. The court's review of the Nevada Supreme Court's decisions was exactly the kind contemplated by Johnson v. Mississippi, 486 U.S. at 587-588, and Dugger v. Adams, 489 U.S. 401, 410 (1989). The full argument on these issues made by the respondent is attached to this brief at Appendices C, E, A, D, G, pages 26-39, 72-91, 127-139.[4]

---

[3] Neither the concurring nor dissenting opinions in the Court of Appeals case disagreed with the majority opinion on this issue. 306 F.3d at 779 (Fisher, J., concurring); id. (Rymer, J. dissenting). Judge Rymer, who wrote the dissenting opinion in this case, also concurred in a previous decision that reached the same result on this issue, Petrocelli v. Angelone, 248 F.3d 877, 892 (9th Cir. 2001), of which the state did not seek review on certiorari.

[4] The state argues that some inconsistency in application of default rules is tolerable, as long as the rules are applied in the "vast majority" of cases, relying on Dugger v. Adams. Respondent submits that this Court's decision in Village of Willowbrook in Olech, 528 U.S. 562, 564-565 (2000) (per curiam), casts considerable doubt on that principle: under Olech, inconsistent treatment of a single individual can violate the equal protection clause of the Fourteenth Amendment; and a state court's denial of relief to a capital petitioner on the basis of a procedural rule that it does not apply to similarly situated litigants would violated Olech. But

The state argues that certiorari should be granted because the Court of Appeals' decision conflicts with the decision in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001), in which the Nevada Supreme Court asserted that it has applied default rules consistently. The state's argument ignores this Court's settled authority. The state courts have the responsibility to decide what state law is, a principle that respondent has always accepted. See, e.g., Lewis v. Jeffers, 497 U.S. 764, 780 (1990). But the adequacy of a state procedural ruling to bar federal review is "not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" Lee v. Kemna, 534 U.S. 362, 375 (2002), quoting Douglas v. Alabama, 380 U.S. 415, 422 (1965). Thus while the Nevada Supreme Court in Pellegrini could determine what state law is, it could not re-interpret its previous default rulings in order to establish that, at the time of the alleged default in respondent's case, the rules were clearly established and consistently applied.[5] That is a determination which the federal court must make independently, as this Court did in Johnson v. Mississippi, Dugger v. Adams, and its other cases on this issue.[6]

---

this point is not determinative, because the Nevada Supreme Court's decisions demonstrate that, in the class of successive collateral proceedings in capital cases, the application of the successive petition rule to bar claims is entirely unpredictable and often unexplained. The dispositions cited in respondent's briefing show that at least a quarter of the Nevada Supreme Court's dispositions in successive petition proceedings in capital cases either ignore the application of default rules altogether, or excuse non-compliance on grounds not applied consistently in other cases. This precludes any argument that the Nevada Supreme Court acts consistently in the "vast majority" of cases.

[5] The Nevada Supreme Court previously asserted, in respondent's own case, that it is not concerned with the question of consistent application of its default rules, because "arguments regarding the consistent or inconsistent application of a procedural bar are aimed at the federal courts rather than this court." Valerio v. State, 112 Nev. 383, 389, 915 P.2d 874 (1996).

[6] Respondent also notes that the state mischaracterizes the adequacy determination as a factual finding, Petition at 18-19, when it is in fact a legal conclusion drawn from the state court's decisions themselves.

The Court of Appeals also made its decision on the basis of all the published and unpublished collateral decisions of the Nevada Supreme Court in successive capital collateral proceedings, while the Pellegrini decision did not even acknowledge the existence of its unpublished dispositions. Further, even considering only the published dispositions, the Nevada Supreme Court routinely addresses the merits of claims without any explanation of why default rules were not applied, thus indicating that its default rules are purely discretionary. E.g., Bejarano v. Warden, 112 Nev. 1466, 1471 n.2, 929 P.2d 922 (1996) (unexplained review of merits of one claim after imposing default rules as to all other claims); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing merits of claim raised for first time on appeal on second collateral proceeding, while imposing defaults as to other claims); Hill v. State, 114 Nev. 169, 171, 953 P.2d 1077 (1998) (addressing merits of claim raised for first time on appeal in second collateral proceeding, based on power to consider constitutional issues raised for first time on appeal if record sufficient, without applying default rules applied to other claims); Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (addressing issue of ineffective assistance sua sponte on appeal from denial of collateral relief); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (same; court "choose[s]" to reach merits without resolving procedural default issues). In fact, the Pellegrini court found it necessary to overrule cases which indicated that more discretionary rules applied to imposition of defaults in capital cases and that imposition of defaults was general discretionary. 34 P.3d at 535-536. However the Nevada Supreme Court interpreted these cases in Pellegrini, the decisions themselves say what they say: the terms of the pre-Pellegrini Nevada Supreme Court decisions demonstrate its power to dispense with any default rule in its unfettered discretion. The Court of Appeals was completely correct in concluding that the Nevada successive petition default rule was

not adequate to bar federal review, and there is no basis for granting certiorari on this issue.

Petitioners attempt to manufacture a basis for granting certiorari which does not exist in this case, and which they have never previously raised, with respect to the burden of proving the inadequacy of a state procedural default ruling to bar federal review. Petition at 14-16. The petition itself acknowledges that the Court of Appeals did not address this issue, Petition at 16; but the state does not acknowledge that it never made any argument on this point to the Court of Appeals. See Respondent's Appendices D, F. This is therefore an entirely inappropriate case for consideration of this issue on certiorari under this Court's consistent precedents. E.g. Youakim v. Miller, 425 U.S. 231, 234 (1976); Delta Airlines v. August, 450 U.S. 346, 362 (1981).

Moreover, the inadequacy of Nevada's successive petition bar to preclude federal review had already been established before the decision in this case. In Petrocelli v. Angelone, 248 P.3d 877, 886-888 (9th Cir. 2001), the Court of Appeals held that Nevada's successive petition rule was not adequate to bar federal review because in capital cases it was not consistently applied and was discretionary. The state did not seek review of that ruling by the Court of Appeals en banc or by this Court on certiorari. The same rule was at issue in this case, and while the state argued that Petrocelli was wrongly decided, it made no argument with respect to the burden of proof. The reason for this is simple: the Nevada Supreme Court's decisions applying its procedural default rules have been thoroughly inconsistent and demonstrate that its application of procedural defaults has been entirely discretionary, and that conclusion is clearly supported wherever the burden of proof may be placed.

2. The Court of Appeals addressed the invalidity of respondent's sentence due to the unconstitutional depravity aggravating factor, although its reversal of the district court's judgment on procedural grounds will potentially allow the review of some substantive claims that were

arguably not exhausted. The state argues that this Court should grant certiorari on this issue, but it does not discuss, or even cite, this Court's decision in Granberry v. Greer, 481 U.S. 129, 134 (1987). In Granberry, this Court held that a Court of Appeals could determine, in its discretion, "whether the interests of justice would be better served by addressing the merits of the habeas petition" when the issue of non-exhaustion arises on appeal. The Court of Appeals addressed that question in its decision, 306 F.3d at 768-770, and the state does not discuss the Court's analysis at all. Respondent submits that this Court should take the state's failure to address this authority as a concession that the Court of Appeals followed this Court's authority in Granberry and that there is no basis for granting certiorari on this issue.[7]

The state also claims that the Court on Appeals' decision on the invalidity of the depravity aggravating factor is an advisory opinion, because further proceedings in the district court could result in invalidation of other parts of the facts of the judgment. The state did not attempt to make this argument to the court below, just as it did not make the exhaustion argument it now offers at any point in the briefing below, see Respondent's Appendices D, F, or in a petition for rehearing. Under these circumstances, this Court should decline to consider these issues. E.g. Delta Airlines v. August, 450 U.S. 346, 362 (1981). In any event, the state's argument is entirely general, and its reasoning would make virtually every routine opinion of this Court in which further proceedings are necessary into an advisory opinion. See, e.g., Powell v. Nevada, 511 U.S. 79, 84 (1994) (holding that delay in arraignment claim could not be barred by state retroactivity ruling without addressing

[7] Moreover, the state does not acknowledge that the litigation in the district court could obviate the exhaustion issue entirely: the state could waive exhaustion, the respondent could withdraw unexhausted claims, or the district court could reject unexhausted claims on the merits. See 28 U.S.C. § 2254(b)(2). Neither the state nor the dissenting judges in the Ninth Circuit addresses this point.

availability of any remedy if violation established). The state does not suggest that there is any conflict in the decisions of the Courts of Appeals, or any particular significance to this issue, or any extreme deviation from this Court's decisions, that would justify the devotion of resources to review on certiorari.

3. The Court of Appeals properly concluded that the unconstitutional depravity aggravating factor infected respondent's death sentence and that the Nevada Supreme Court's attempt to uphold the factor and the sentence was unavailing. There seems to be no dispute that the terms of the instruction defining depravity were unconstitutionally vague under Godfrey v. Georgia, 446 U.S. 420 (1986). CR 29, Ex. PP, instruction 10. There can also be no dispute on what the trial record shows: the prosecutor strongly argued the terms of the depravity definition to the jury; the state explicitly disclaimed any reliance on torture as an alternative theory of depravity, on the ground that there was no evidence of torture; the state's medical evidence indicated that death was caused by all the stab wounds; and there was no evidence that the perpetrator had any specific sadistic intent to cause pain, beyond accomplishing the killing (which is required to establish torture under Nevada law) or any intent to inflict mutilation beyond accomplishing the killing (which is required to establish mutilation under Nevada law). CR 27, Ex. FF at 200-201; CR 28, Ex. LL at 59-60. There is also no possible dispute that the state district court and the Nevada Supreme Court did not consider either the state's concession that torture was not present , or the absence of any evidence of intent to inflict torture or to inflict injuries beyond the act of killing, in light of the medical evidence. Respondent's Appendix A at 1 n.1.

The only issue in dispute is whether the Nevada Supreme Court's highly eccentric analysis, in its unpublished decision in respondent's initial collateral proceeding, salvaged the validity of the

aggravating factor and the sentence. The state does not argue that there is any conflict among the Court of Appeals on this issue, since there appears to be no state case in which an attempt has been made to avoid the effect of an invalid depravity factor in this way, nor does the state suggest that there is any national significance justifying review of the state court's idiosyncratic procedure in this case.

This Court's decision in Richmond v. Lewis, 506 U.S. 40 (1992), holds that "[a]t a minimum, we must determine that the state court actually reweighed . . . '[o]nly constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.' . . . [T]he state appellate court or some other sentencer must actually perform a new sentencing calculus, if the sentence is to stand." 506 U.S. at 47, quoting Stringer v. Black, 503 U.S. at 1137. In this case, there is no language in the Nevada Supreme Court's order remotely suggesting that it conducted a harmless error or reweighing analysis: the terms "harmless error," "weighing," and "reweighing" simply do not appear in the order.[8] The Court's "agreement" with the state district court that the killing "involved torture (or serious physical abuse)" Respondent's Appendix A at 1 n. 1 (emphasis supplied), does not suggest that the Supreme Court made any findings based on the evidence: the state district court did not, in fact, refer to "serious physical abuse" at all. Similarly, the Court's statement that the evidence "satisfies us" that the victim was subjected to "torture and/or serious physical abuse," id. (emphasis supplied) does not indicate that the Court actually made a finding that either of these factors was present. Most important, however, the last sentence of the Court's analysis does not suggest that any reweighing or harmless

[8] The Court of Appeals referred to the Nevada Supreme Court's application of a Walton analysis without acknowledging that it was doing so, 306 F.3d at 758, but this Court's precedents do not suggest that reweighing can be performed covertly.

analysis has taken place at all: the Court concluded "that the depravity of mind instruction in Mr. Valerio's case was not unconstitutionally vague as applied." Id. (emphasis supplied). That is not reweighing or harmless error analysis: it is simply the replacement of one theory of the aggravating factor by a different one, with no consideration of the effect of the unconstitutional factor on the jury's verdict or on the court's sentencing calculus[9]. This Court's decision in Stringer v. Black, 503 U.S. 222, 230-231 (1992) requires a reviewing court to conduct "a thorough analysis of the role an invalid aggravating factor played in the sentencing process [and] determine what the sentencer would have done absent the factor." In this case, the state emphasized the depravity definition to the jury; and a properly-instructed jury might well have rejected the factor altogether, since it rejected a charged robbery aggravating factor, and there was essentially no evidence to support a torture or mutilation theory of depravity(which the state conceded as to torture).

This absence of analysis is aggravated by the Court's reintroduction of the vague language of the original factor into this "narrowing" language ("serious and depraved physical abuse"); by the Court's failure to notice the state's concession on the torture issue at trial; by the Court's failure to address the state's medical evidence, which is inconsistent both with torture and with infliction of "physical abuse beyond the act of killing itself." Respondent's Appendix A at 1 n.1; 306 F.3d at 760.

---

[9] In addition, under Nevada law the finding of an aggravating circumstance, and the weighing of aggravating against mitigating circumstances, establishes only eligibility for the death penalty, and a jury is never required to impose a death sentence even when eligibility is established. E.g., Bennett v. State, 111 Nev. 1099, 1109, 901 P.2d 676 (1995). The Court's order contains no discussion at all of the effect of the invalid depravity factor on the jury's ultimate decision as to the appropriate sentence, nor does it indicate that the Court itself conducted the ultimate sentencing calculus.

The Court of Appeals' decision explains why the Nevada Supreme Court's order cannot constitute adequate reweighing under Walton v. Arizona, 497 U.S. 738 (1990), since the original fact finding was made by a jury, and it correctly points out that the Nevada Supreme Court itself agrees with that position. 306 F.3d at 758, quoting Pertgen v. State, 110 Nev. 554, 562-563, 875 P.2d 361 (1994). The Court of Appeals also thoroughly discussed why the Nevada Supreme Court's order did not provide the kind of "close appellate scrutiny" of the effect of the invalid aggravating factor required by Stringer v. Black, 503 U.S. at 230, and its progeny. 306 F.3d at 759-762. But the main reason that certiorari should not be granted is that the terms of the Nevada Supreme Court's order are so confused that no useful precedent could be generated from analyzing its idiosyncratic inadequacy.

The other peculiarities of this case also militate against its use as a vehicle for deciding any constitutional issue. First, respondent has not been able to find any case in which a court has attempted to narrow a vague aggravating factor on a theory which the state has explicitly abandoned. If this Court were to grant certiorari to review this issue, it would have to conclude that the state's action violated the right to due process of law under the Fourteenth Amendment, however it decided the reweighing issue. See, e.g., Lankford v. Idaho, 500 U.S. 110, 126-127 (1991).

Second, the jury was instructed that Nevada's depravity factor would be established on three theories, depravity, torture, or mutilation, each in the disjunctive, and with a definition given only for depravity. A purported narrowing construction of the factor on appeal, and an appellate finding of torture or mutilation, is not a "narrowing" of the language given to the jury, but a replacement of one theory of establishing the factor with a completely different one. When, as here, the replacement factor is one that the state disavowed at trial, it is clear that the factfinding and the imposition of

sentence are being made by the appellate court. Even assuming arguendo that Ring v. Arizona, 536 U.S. 584 (2002) does not apply to this case (as the Court of Appeals did), Nevada has an explicit constitutional prohibition on appellate fact finding. Nev. Const. Art. 6 § 4 (jurisdiction of Nevada Supreme Court in criminal cases limited to "questions of law alone.") A purported finding of an alternate theory of aggravation by the Nevada Supreme Court would violate this express constitutional limitation, which would in turn deprive respondent of a liberty interest in violation of due process of law under the Fourteenth Amendment. E.g., Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

Third, the terms of the Nevada Supreme Court's order would not allow any federal court to conclude that adequate narrowing was actually conducted. The Court's conclusion was that the evidence showed "torture and/or serious physical abuse." The term "and/or" is intrinsically ambiguous, and it does not establish that the court in fact found either theory. This issue would have to be governed by Richmond v. Lewis, 506 U.S. 40, 50-51 (1992), in which this Court held that appellate review did not cure the effect of an unconstitutional depravity factor because a majority of the reviewing court did not agree on the theory of affirmance. Here, the Nevada Supreme Court's order is fatally ambiguous as to what theory, if any, the members of the court agreed upon.

In short, the inadequacy of this appellate review could be characterized as insufficiently "close appellate scrutiny" under Stringer, 503 U.S. at 230, as the Court of Appeals concluded, 306 F.3d at 759-762; but it could equally plausibly be found to be a complete absence of any sort of "actual" reweighing under Richmond. Whatever analytical approach is adopted, it is clear that the death sentence cannot stand. Accordingly, there is no basis upon which this Court should considering granting certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

DATED this 17th day of March, 2003.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender
For the District of Nevada

MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 388-6577

LAWRENCE D. WISHART, ESQ.
313 Flint Street
Reno, Nevada 89501
(775) 348-2070

No. 02-1188

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

E.K. McDANIEL, Warden, Ely State Prison;
JACKIE CRAWFORD, Director, Nevada Department of Prisons;
BRIAN SANDOVAL, Attorney General of the State of Nevada, Petitioners,

v.

JOHN ESPIREDION VALERIO, Respondent.

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANNY A. FORSMAN
Federal Public Defender
For the District of Nevada
*MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, #700
Las Vegas, Nevada 89101
(702) 388-6577

LAWRENCE D. WISHART, ESQ.
313 Flint Street
Reno, Nevada 89501
(775) 348-2070

*Counsel of record

BEST AVAILABLE COPY

INDEX TO THE APPENDIX

		PAGE
A.	ORDER DISMISSING APPEAL (1/24/92) (Valerio v. State, Case No. 21886, Nevada Supreme Court)	001
B.	SUPPLEMENTAL BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT (8/17/01) (Valerio v. Bayer, Case No. 98-99033, Ninth Circuit Court of Appeals)	004
C.	SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT (8/17/01) (Valerio v. Bayer, Case No. 98-99033, Ninth Circuit Court of Appeals)	0021
D.	APPELLEES' SUPPLEMENTAL BRIEF (8/16/01) (Valerio v. Bayer, Case No. 98-99033, Ninth Circuit Court of Appeals)	0043
E.	SECOND SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT (11/16/01) (appendix omitted) (Valerio v. Crawford, Case No. 98-99033, Ninth Circuit Court of Appeals)	0066
F.	RESPONDENTS' SUPPLEMENTAL BRIEF (12/19/01) (appendix omitted) (Valerio v. Bayer, Case No. 98-99033, Ninth Circuit Court of Appeals)	0094
G.	SUPPLEMENTAL REPLY BRIEF OF PETITIONER-APPELLANT (1/22/02) (Valerio v. Crawford, Case No. 98-99033, Ninth Circuit Court of Appeals)	00121

JUN 0 6 1992

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ESPIREDION VALERIO, Appellant, vs. THE STATE OF NEVADA, Respondent.

No. 21886

FILED

JAN 24 1992

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richardson
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

The appellant, John Espiredion Valerio, appeals from the denial of a petition for post-conviction relief. On appeal, Mr. Valerio contends that he was denied the effective assistance of counsel during his murder trial and on direct appeal[1]; he gives several examples of what he considers to be ineffective assistance of counsel during trial and on appeal.[2]

The right to counsel in a criminal case is required under the sixth amendment and applies to the states through the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). This right to counsel necessarily includes the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). To establish a claim of ineffective

[1]In 1988, Mr. Valerio was convicted of first degree murder and sentenced to death. On direct appeal, Valerio challenged the conduct of the prosecutor and challenged admitted photographs of the murder victim on the ground that they were unduly prejudicial. We criticized the prosecutor's behavior but upheld Mr. Valerio's conviction and sentence of death.

[2]In his opening brief, Mr. Valerio also challenges the depravity of mind instruction that his jury received; he contends that the jury was improperly instructed. We agree with the district court that the murder of Karen Blackwell involved torture (or serious physical abuse). In Robins v. State, 106 Nev. 611, 629, 798 P.2d 558, 570 (1990), we recognized that a depravity of mind instruction must include "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to [the] aggravating circumstance." In this case, evidence that Ms. Blackwell was stabbed more than forty-five times, had "defensive wounds" on her hands and arms, and died not from one wound but from all wounds combined, satisfies us that she was subjected to torture and/or serious physical abuse before she died. As in Robins, we thus conclude that the depravity of mind instruction in Mr. Valerio's case was not unconstitutionally vague as applied.

assistance of counsel, the defendant must satisfy a two-part test: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984).

We find that although Mr. Valerio's counsel were not perfect, they did not commit any errors so serious that they were not functioning as the counsel required under the sixth amendment. Specifically, we conclude that Mr. Valerio's trial counsel and his counsel on direct appeal performed adequately. With regard to Mr. Valerio's trial counsel, she did not err in asking Ms. Gagliardo about her car; and, when the prosecution asked more specific questions about the car, Mr. Valerio's trial counsel immediately objected, and the question was withdrawn.

In addition, Mr. Valerio's trial counsel did not err in failing to question Ms. Gagliardo about the death of her husband more than fourteen years earlier: Ms. Gagliardo was never charged with the offense. Similarly, Mr. Valerio's trial counsel's failure to object to the testimony of Ms. Blackwell's daughter was not a serious error. The daughter was the last person to see Ms. Blackwell before she disappeared; in addition, the daughter was called as a witness to identify her mother's keys. Further, Mr. Valerio's trial counsel did not err in failing to procure the photographs that Maria and Charles Lanham had viewed. These photographs had no probative value, as Maria Lanham, the only person who saw someone exit Ms. Blackwell's car, never identified anyone in the photographs as a suspect. In addition, Ms. Lanham testified at trial that she had seen a man exit Ms. Blackwell's car. We conclude that Mr. Valerio's

other claims of ineffective assistance of trial counsel are also without merit.

With regard to Mr. Valerio's counsel on direct appeal, we also conclude that Mr. Valerio's claims of ineffective assistance lack merit. Specifically, it was reasonable for Mr. Valerio's appellate counsel to focus on the penalty phase of his trial.[3] In addition, we find that Valerio has not shown that he was prejudiced by his counsels' performances. Accordingly, we

ORDER this appeal dismissed.

Mowbray, C.J.

Springer, J.

Rose, J.

Steffen, J.

Young, J.

cc: Hon. Myron E. Leavitt, Judge
Hon. Frankie Sue Del Papa, Attorney General
Lynn R. Shoen
Rex Bell, Clark County District Attorney
James Tufteland, Chief Deputy District Attorney
William P. Henry, Deputy District Attorney
Loretta Bowman, Clerk

[3]Although Mr. Valerio claims that his appellate counsel stated that Mr. Valerio had received a fair trial, appellate counsel agreed that, on balance, the guilt phase of Mr. Valerio's trial was fair. Mr. Valerio's trial counsel, however, concentrated on the penalty phase of Mr. Valerio's trial and continually asserted that this portion of the trial was not fair.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,

Petitioner-Appellant,

v.

ROBERT BAYER, et al.,

Respondents-Appellees.

Case No. 98-99033
D.C. No. CV-N-96-362-HDM

(DEATH PENALTY CASE)

RECEIVED
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

AUG 17 2001

FILED _____ ___
DOCKETED _____ ___
DATE INIT

SUPPLEMENTAL BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT

FRANNY A. FORSMAN
Federal Public Defender
MICHAEL PESCETTA
Assistant Federal Public Defender
330 S. Third Street, Suite 700
Las Vegas, NV 89101
Telephone: (702) 388-6577

Attorneys for Amicus Curiae

APPENDIX-005

TABLE OF CONTENTS

Page(s)

CONCLUSION 8

CERTIFICATE OF COMPLIANCE 9

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

Page(s)

CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct 2348 (2000) 9

Bargas v. Burns, 179 F.2d 1207 (9th Cir. 1999) 4

Bejarano v. Warden, 106 Nev. 840, 801 P.2d 1388 (1990) 5

Cabana v. Bullock, 474 U.S. 376 (1986) 7,8

Calderon v. United States District Court (Bean), 96 F.3d 1126 (9th Cir. 1996) .. 5

Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993) 7

Ceja v. Stewart, 97 F.3d 1246 (9th Cir. 1996) 5,6

Clemons v. Mississippi, 494 U.S. 738 (1990) 8

Dillard v. Roe, 244 F.3d 758 (9th Cir. 2001) 9

Geary v. State, 114 Nev. 100 952 P.2d 431 (1998) 7

Godfrey v. Georgia, 446 U.S. 420 (1980) 10

Harris v. Reed, 489 U.S. 255 (1989) 3

Hicks v. Oklahoma, 447 U.S. 343 (1980) 7

Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001) 4, 9

Lambright v. Smith, 241 F.2d 1201 (9th Cir. 2001) 4

Lambright v. Stewart, 220 F.3d 1022 (9th Cir. 2000) 2, 3

Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 1999) 5

Lewis v. Jeffers, 497 U.S. 764 (1990) 7

Mathis v. Ducharme, 1999 WL 273419 (9th Cir. March 22, 1999) 2

McKenna v. McDaniel, 65 F.3d 1483 (9th Cir. 1995) 6, 9, 10

Petrocelli v. Angelone, 242 F.3d 867 (9th Cir. 2001) 2

Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001) 3

Poland v. Stewart, 169 F.3d 573 (9th Cir. 1999) 5

Richmond v. Lewis, 506 U.S. 40 (1992) 8

Schell v. Witeck, 218 F.3d 1017 (9th Cir. 2000) (en banc) 1

Slack v. McDaniel, 529 U.S. 473 (2000) 2

Standen v. Whitley, 994 F.2d 1417 (9th Cir 1993) 7

United States v. Zuno-Arce, 245 F.3d 1108 (9th Cir. 2001) 1, 2

Valerio v. State, 112 Nev. 383, 915 P.2d 874 (1996) 6

Walton v. Arizona, 497 U.S. 639 (1990) 9

Ylst v. Nunnemaker, 501 U.S. 797 (1991) 4,5

STATUTES

28 U.S.C. § 2253(c) 1

28 U.S.C. § 2254 10

Nev. Const. Art. 6 § 4 7

Nev. Rev. Stat. § 177.055(2) 5

Nev. Rev. Stat. § 200.030(4)(a) 9

Nev. Rev. Stat. § 34.810 6

OTHER AUTHORITIES

Fed. R. App. Proc. 22(b)(2) 1

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. ROBERT BAYER, et al., Respondents-Appellees.	Case No. 98-99033 D.C. No. CV-N-96-362-HDM (DEATH PENALTY CASE)

SUPPLEMENTAL BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT

1. After granting rehearing en banc, this Court ordered further briefing on the procedural default issues presented in this case. This Court should issue a certificate of appealability in order to address those issues. Fed. R. App. Proc. 22(b)(2); 28 U.S.C. § 2253(c); see, e.g., Schell v. Witeck, 218 F.3d 1017, 1021 n. 4 (9th Cir. 2000) (en banc).[1]

[1] In the amicus brief in support of the petition for rehearing, and in a supplemental brief filed on October 13, 2000, amicus showed why the certificate of appealability (COA) provisions of Circuit Rule 22-1 cannot properly be applied to bar consideration of appellant's procedural claims, and amicus continues to rely on the arguments presented there. Since that briefing was filed, this Court issued an amended decision in United States v. Zuno-Arce, 245 F.3d 1108 (9th Cir. 2001) from which Judge Browning dissented, noting that the application of Rule 22-1 was at least (continued...)

Under Slack, this Court takes a "quick look" at the substantive issues which were barred under a challenged procedural ruling[2] to determine if at least one

---

[1](...continued)
unclear, and citing an unpublished decision in which a panel of this Court had held that the rule did not apply to cases (like appellant's) in which the notice of appeal was filed before the adoption of the rule. 245 F.3d at 1109, citing Mathis v. Ducharme, 1999 WL 273419 (9th Cir. March 22, 1999). To the extent that it can be considered due to its citation in a published opinion, Mathis supports appellant's position that it was at least unclear that he was required to try to comply with Rule 22-1, since the fact that the 35-day period for moving to expand a COA had already expired in his case before Rule 22-1 itself was adopted.

Further, in Petrocelli v. Angelone, 242 F.3d 867 (9th Cir. 2001), this Court issued a COA in a case governed by Slack v. McDaniel, 529 U.S. 473 (2000) and addressed the petitioner's procedural and substantive claims. The court made no reference to a bar under Circuit Rule 22-1, despite the state respondents' opposition to the appellant's motion to issue a COA on the ground that the motion was filed more than thirty-five days after the Slack decision and therefore was barred by Rule 22-1. JN. Exs. 4, 5; 242 F.3d at 880. Petrocelli, like the other cases following the COA rule change imposed by Slack, demonstrates the unreasonableness of applying Rule 22-1 retroactively to bar all consideration of issues in a capital habeas case which was already pending in this Court when the rule was adopted.

[2] The claims barred by the district court's procedural default ruling included numerous claims of ineffective assistance of counsel, including claims of failure to investigate and present mitigating evidence; failure to investigate alibi evidence or file a notice of alibi; and evidence of another suspect whom the victim had agreed to testify against as part of her own plea negotiation. CR 5 (claims 16B, D, L, Z). The claims barred by the abuse of the writ ruling were claims of ineffective assistance and failure to disclose evidence of another apparent suspect, where the defendant maintained his innocence and the trial court ordered disclosure of the evidence. CR 23 (claims 16-H, 17-M, 25). These claims are at least as arguable as those found to satisfy the "modest standard" for issuing a COA in Lambright v. Stewart, 220 F.3d at 1028-1030 (claims of failure to investigate and present mitigating evidence; failure to give instruction on lesser included offense where significant and compelling of higher offense present).

substantive claim satisfies the COA standard. E.g., Lambright v. Stewart, 220 F.3d 1022, 1026 (9th Cir. 2000). Since a "quick look" at the facial allegations of the underlying claims indicates that they do have some substance, this Court must proceed to address the propriety of the district court's procedural rulings. The district court clearly erred in dismissing claims under the abuse of the writ doctrine, where the previous federal habeas petition was dismissed without prejudice for exhaustion, and reversal on this ground is required by the holding in Slack. Petrocelli v. Angelone, 248 F.3d 877, 885 (9th Cir. 2001). This Court has requested further briefing on the validity of the state default rulings relied on by the district court, and that question is addressed in appellant's supplemental brief and this brief.

2. The Nevada Supreme Court's default rulings in this case, on which the district court relied in finding appellant's claims procedurally barred, are not adequate to bar federal review, because they do not identify to which particular claim each default ruling applied.

Before a federal court analyses the adequacy of a state court ruling to bar federal review, it must determine whether the state court "clearly and expressly" made a "plain statement" that it was relying on a state procedural rule as the basis of its judgment. Harris v. Reed, 489 U.S. 255, 263 (1989). Linking the rule relied upon with the individual claim purportedly barred is required because the federal court cannot perform its task of assessing the adequacy and independence of any default

ruling without knowing to what claim it supposedly relates: the federal court must consider, as a federal question, a range of issues relating to the adequacy of the default ruling itself and its independence of federal law, including, for instance, whether the petitioner actually violated the cited procedural rule with respect to the particular claim, whether the cited rule was in effect at the time of the alleged default, whether the petitioner substantially complied with the rule, and other relevant issues, 2 James S. Liebman and Randy Hertz, Federal Habeas Corpus Practice and Procedure § 26, 2d at 1049-1074 (3d ed. 1998); see, e.g., Hoffman v. Arave, 236 F.3d 523, 530-531 (9th Cir. 2001) (analyzing adequacy of particular default rule to ineffective assistance of counsel claim); Lambright v. Smith, 241 F.2d 1201, 1203-1206 (9th Cir. 2001) (same) If the state ruling does not identify the individual claim and the particular default rule, the federal court cannot consider those issues, and is in danger of having to excogitate a basis for a procedural default ruling that the state court has not specified. See Bargas v. Burns, 179 F.2d 1207, 1218-1219 (9th Cir. 1999) (Tashima, J., dissenting). That identification is also critical because some rules that state courts characterize as "default" rules - - such as a preclusion bar to raising claims previously ruled upon - - are not bars to federal review at all. E.g., Ylst v. Nunnemaker, 501 U.S. 797, 805-806 (1991).[3]

[3] This problem has particular force with respect to Nevada capital cases. The Nevada Supreme Court is required to conduct mandatory review of certain issues on (continued...)

This Court has repeatedly recognized that a ruling that cites "mixed arguments of preclusion and waiver with respect to . . . claims [does] not clearly base its decision on independent and adequate state law grounds." Lambright v. Stewart, 241 F.3d 1201, 1206 (9th Cir. 1999), quoting Poland v. Stewart, 169 F.3d 573, 574 n. 10 (9th Cir. 1999), quoting Ceja v. Stewart, 97 F.3d 1246, 1253 (9th Cir. 1996). Similarly, in Calderon v. United States District Court (Bean), 96 F.3d 1126, 1131 (9th Cir. 1996), this Court held that the California Supreme Court's order was "ambiguous" and

> "does not specify which of Bean's thirty-nine claims the court rejected under [the religitation preclusion rule] and which it rejected under [the waiver by failure to raise previously rule]. '[A] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review.' Morales, 85 F.3d at 1392 (citing Siripongs v. Calderon, 35 F.3d 1308, 1317-18 (9th Cir.

---

[3](...continued)
direct appeal in capital cases. Nev. Rev. Stat. § 177.055(2) (b, c, d) (requiring court to review sentence and determine whether sentence excessive, evidence supports aggravating factors, and sentence imposed under influence of "passion, prejudice or any arbitrary factor"). The Nevada Supreme Court does not always indicate what it has reviewed: for instance, on direct appeal in Bejarano v. State, only a search issue was raised, see Request to Take Judicial Notice (JN) Exs. 6, 7, 8, and the Nevada Supreme Court opinion simply recited the language of the mandatory review provision. JN Ex. 9. On appeal from the denial of post-conviction relief, however, the court rejected specific constitutional attacks on the aggravating factors on the ground that they had been rejected on direct appeal, despite the fact that no constitutional claims had been mentioned in that decision. Bejarano v. Warden, 106 Nev. 840, 841, 801 P.2d 1388 (1990). Under these circumstances, it is impossible to determine which rulings are not bars at all under Ylst (because they treat the claims as previously-raised), and which rulings are directed to claims treated as new claims, from a Nevada default ruling that mixes these theories of default.

1994), cert. denied, 513 U.S. 1183, 115 S.Ct. 1175, 130 L.Ed.2d 1127 (1995))".

The Nevada Supreme Court's ruling in Mr. Valerio's case replicates the problems with the orders at issue in Lambright, Ceja, Poland and Bean. The court invoked both preclusion of relitigation bars and waiver bars[4] without distinguishing which rule it was applying to any particular claim, Valerio, 112 Nev. 383, 385-388, 915 P.2d 874 (1996).[5] Its order is therefore as inadequate to bar federal review of appellant's substantive claims as the orders at issue in this Court's cited cases.

3. This Court granted rehearing en banc in this matter without limitation. The substantive issue resolved in the panel opinion was whether appellant's death penalty could be sustained even though one of the aggravating circumstances was the same depravity aggravator found unconstitutionally vague in McKenna v. McDaniel, 65 F.3d 1483, 1489 (9th Cir. 1995). The Nevada Supreme Court decision does not support a conclusion that the circumstance was in fact narrowed in a way that is constitutionally permissible. The Supreme Court's narrowing jurisprudence requires

---

[4] The Nevada default rules include both the preclusion of relitigation bar, and the waiver of claims by failing to raise them in previous proceedings bar, in the same statute. Nev. Rev. Stat. § 34.810 (1)(b), (2).

[5] The court referred to "the grounds among claims 1-18" that were denied as new claims under § 34.810; "those grounds among claims 1-18" that had been previously raised; "the 'old' ground among 1-18"; and "those 'new' grounds among 1-18", id. at 386-388 (emphasis added), without specifying which claims it considered barred by which rule.

a finding of the factor applying the narrowing construction to be made by a state court. E.g., Lewis v. Jeffers, 497 U.S. 764, 771, 776-793 (1990). The terms of the Nevada Supreme Court's decision here, see CR 18-I do not constitute an unambiguous finding: part of the language used purports simply to agree with a legal conclusion made by the trial court; see CR 29-ZZ and the language (that the evidence "satisfies" the court that victim, was subjected to "torture and/or serious physical abuse") is obviously not the equivalent of a finding beyond a reasonable doubt, as state law requires. See Standen v. Whitley, 994 F.2d 1417, 1423 (9th Cir 1993) (Nevada Supreme Court could not find a constitutional error harmless by concluding that substantial evidence to supported conviction).[6]

Second, the terms of the Nevada Supreme Court decision are ambiguous. The reference to "torture and/or serious physical abuse" leaves this Court with no guidance as to whether a majority of the Nevada Supreme Court did in fact agree

---

[6] E.g., Geary v. State, 114 Nev. 100, 104-105, 952 P.2d 431, 432 (1998); see Cabana v. Bullock, 474 U.S. 376, 389 (1986) (holding state court's statement did not amount to finding that defendant was actual killer). The Nevada Constitution also explicitly limits the Nevada Supreme Court's jurisdiction on appeal in criminal cases to "questions of law alone." Nev. Const. Art. 6 § 4. Since the Nevada Constitution unequivocally precludes the court from making any factual finding, it would be a violation of due process to allow the state appellate court to uphold a death sentence by making such a finding. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); Cabana v. Bullock, 474 U.S. 376, 386 (1986) (finding to remedy Eighth Amendment violation can be made only by "court that has the power to find the facts"); cf. Canape v. State, 109 Nev. 864, 881-882, 859 P.2d 1023 (1993) (reweighing of aggravating and mitigating factors not precluded by Nevada Constitution)

upon a single construction of the aggravating factor,[7] because the "and/or" terminology is fatally ambiguous. See Richmond v. Lewis, 506 U.S. 40, 51-52 (1992) (state court's decision did not demonstrate constutionally-adequate reweighing under Clemons v. Mississippi, 494 U.S. 738 (1990), because examination of the majority concurring and dissenting opinions did not establish that majority of the court had agreed on how and whether reweighing accomplished).

Third, the Nevada Supreme Court's decision also disregards the state's concession at trial that there was no basis for finding torture. CR 28-LL at 59-62. That concession leaves the state record inadequate to support a finding of the theory of aggravation by an appellate court consistent with due process of law. See Cabana v. Bullock, 474 U.S. at 388 n. 5 (indicating that appellate factfindings may not be permissible in some circumstances). A purported finding of an aggravating factor which is essentially a substitution of a different factor based on a theory that the state conceded at trial did not exist cannot be constitutionally reliable under the Eighth Amendment.

Finally, following the briefing and panel opinion in this case, the Supreme

---

[7] The Nevada Supreme Court's decision acknowledged the uncontradicted evidence that the victim died from all the wounds combined, CR 18-I at 1 n. 1, and thus it cannot be assumed that the court applied a construction of "serious physical abuse" that contradicted its own definition, which requires that the abuse be "beyond the act of killing itself."

Court held in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct 2348 (2000), that any fact that increases the punishment to which a defendant is exposed is an element of the offense that must be found by a jury. The jury's finding of the aggravator in Mr. Valerio's case was made under an unconstitutional definition of depravity and it is therefore invalid; and no Nevada court can make the finding in place of the jury under Apprendi.[8] While this Court has not yet determined whether Apprendi applies to cases pending on habeas, Dillard v. Roe, 244 F.3d 758, 773 n. 19 (9th Cir. 2001) the Apprendi rule is clearly a "watershed" rule that must be applied on collateral review, because it affects the proper apportionment of power to juries under the Sixth and Fourteenth Amendment, and without jury findings on all elements of a criminal offense no capital conviction and sentence can conform to the constitutional jury trial guarantee. Hoffman v. Arave, 236 F.3d 523, 547-548 (9th Cir. 2001) (Pregerson, J., concurring). Since mitigating evidence was presented at appellant's trial, the writ must be granted with respect to appellant's death sentence. McKenna, 65 F.3d at

---

[8] A finding of an aggravating factor is an "element" of a death-eligible offense in Nevada. Unlike the sentencing structure at issue in Walton v. Arizona, 497 U.S. 639, 649 (1990), the Nevada statutory scheme does not make death or lesser sentences the sanction for first degree murder as such; instead, it provides for a sentence of death "only if" aggravating factors are found. Nev. Rev. Stat. § 200.030(4)(a); see also § 200.030(4)(b) (findings of aggravating factors not necessary to imposition of sentence less than death).

1490.[9]

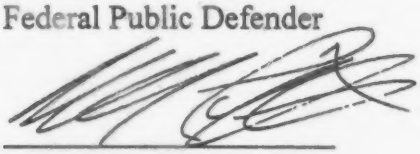
CONCLUSION

For the reasons stated above, in the briefing previously filed, and in the briefs filed by appellant. amicus curiae submits that this Court should reverse the judgment of the district court denying Mr. Valerio's petition for writ of habeas corpus.

Dated this 17th day of August, 2001.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender



MICHAEL PESCETTA
Assistant Federal Public Defender

Attorney for Amicus Curiae

---

[9] The unconstitutionality of the language of the Nevada depravity aggravator has been clear since the Supreme Court's decision in Godfrey v. Georgia, 446 U.S. 420, 428, 433 (1980). McKenna v. McDaniel, 65 F.3d 1483, 1489 (9th Cir. 1995); 28 U.S.C. § 2254 (d)(1).

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately space 14-point. The total number of words is 3,416

Dated this 17th day of August, 2001.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender

MICHAEL PESCETTA
Assistant Federal Public Defender

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Federal Public Defender and on this 17th day of August, 2001, I served a copy of the foregoing **SUPPLEMENTAL BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT** by mailing a copy thereof to:

David F. Sarnowski
Deputy Chief Attorney General
100 North Carson Street
Carson City, Nevada 89701

Lawrence D. Wishart, Esq.
313 Flint Street
Reno, Nevada 89501

An employee of the Federal Public Defender

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,

Petitioner-Appellant,

v.

ROBERT BAYER, et al.,

Respondents-Appellees.

Case No. 98-99033
D.C. No. CV-N-96-362-HDM

(DEATH PENALTY CASE)

RECEIVED
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

AUG 17 2001

FILED _____ _____
DOCKETED _____ _____
DATE INITIAL

SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT

LAWRENCE D. WISHART
313 Flint Street
Reno, Nevada 89501
Telephone: (775) 348-2070

Attorney for Petitioner-Appellant

TABLE OF CONTENTS

Page(s)

I. INTRODUCTION AND LEGAL PRINCIPLES 1

II. THE NEVADA DISPOSITIONS IN CAPITAL COLLATERAL PROCEEDINGS SHOW THAT DEFAULT RULES ARE APPLIED INCONSISTENLY AND IN THE COURT'S UNFETTERED DISCRETION 6

CONCLUSION 15

CERTIFICATE OF COMPLIANCE 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Page(s)

CASES

Bejarano v. State, 106 Nev. 840, 801 P.2d 1388 (1990) 8

Bejarano v. Warden (Bejarano II), 112 Nev. 1466, 929 P.2d 922 (1996) .. 6, 7, 13

Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995) 9, 10

Bush v. Gore, 531 U.S. 98 (2000) (per curiam) 5

Calderon v. United States District Court (Bean), 96 F.3d 1126 (9th Cir. 1996) .. 4

Colley v. State, 105 Nev. 235, P.2d 1229 (1989) 13

Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997) 12

Duckett v. Godinez, 67 F.3d 734 (9th Cir. 1995) 3

Dugger v. Adams, 489 U.S. 401 (1989) 5, 12

Emmons v. State, 104 Nev. 105, 754 P.2d 836 (1988) 4

Fields v. Calderon, 125 F.3d 757, (9th Cir. 1997) 4, 6

Ford v. Georgia, 498 U.S. 4 (1991) 4

Ford v. Warden, 111 Nev. 872, 901 P.2d 123 (1995) 8

Gunter v. State, 95 Nev. 886, 620 P.2d 859 (1980) 10

Hardison v. State, 84 Nev.125, 437 P.2d 868 (1968) 10

Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) 9

Johnson v. Mississippi, 486 U.S. 578 (1998) 3, 4

Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985) 4

Lane v. State, 110 Nev. 1156, 881 P.2d 1358 (1994) 8

Lonchar v. Thomas, 517 U.S. 314 (1996) 14

Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991) 10

McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996) 12, 14

McKenna v. McDaniel, 65 F.3d 1483 (9th Cir. 1995) 2, 4, 11

MGIC Indemnity Corp. v. Weisman, 803 F.2d 500 (9th Cir. 1986) 3

Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996) 1, 4

Moran v. McDaniel, 80 F.3d 1261 (9th Cir. 1996) 2, 5

Myers v. Ylst, 897 F.2d 417 (9th Cir. 1990) 5

Paine v. State, 110 Nev. 609, 877 P.2d 1025 (1994) 3

Passanisi v. Director, 105 Nev. 63, 769 P.2d 72 (1989) 2

Pertgen v. State, 110 Nev. 554, 875 P.2d 361 (1994) 11

Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001) 2, 3

Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992) 8

Reece v. Georgia, 350 U.S. 85 (1955) 5

Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990) 6

Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994) 4

Stocks v. Warden, 86 Nev. 758, 476 P.2d 469 (1978) 10

United States v. Flores-Payon, 942 F.2d 556 (9th Cir. 1991) 1

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam) 5

Warden v. Lischko, 90 Nev. 221, 523 P.2d 6 (1974) 10

Wells v. Maass, 18 F.3d 1005 (9th Cir. 1994) 4

STATUTES

Fed. R. Evid. 201 3

Nev. Rev. Stat. § 177.345(1) 12

Nev. Rev. Stat. § 34.575(3) 7

Nev. Rev. Stat. § 34.810(1)(b) 2

Nev. Rev. Stat. § 34.820(1) 12

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,	)	
	)	Case No. 98-99033
Petitioner-Appellant,	)	D.C. No. CV-N-96-362-HDM
	)	
v.	)	
	)	
	)	(DEATH PENALTY CASE)
ROBERT BAYER, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	
	)	

SUPPLEMENTAL BRIEF
OF PETITIONER-APPELLANT

I. INTRODUCTION AND LEGAL PRINCIPLES

The district court dismissed many of Mr. Valerio's constitutional claims based on procedural defaults imposed by the Nevada Supreme Court. This Court reviews that ruling de novo. Morales v. Calderon, 85 F.3d 1387, 1389 n. 6 (9th Cir. 1996).[1]

The Nevada Supreme Court's procedural default rulings imposed in collateral proceedings in capital cases are not adequate to bar federal review of a petitioner's

[1] The arguments made on this issue are legal ones that this Court can entertain on appeal. E.g., United States v. Flores-Payon, 942 F.2d 556, 558 (9th Cir. 1991).

constitutional claims.[2] This Court has already recognized that the Nevada Supreme Court applies default bars based on its successive petition rules in its discretion, Petrocelli v. Angelone, 248 F.3d 877, 888 (9th Cir. 2001); McKenna v. McDaniel, 65 F.3d 1483, 1489 (9th Cir. 1995), but it has not done so with respect to asserted timeliness bars. Moran v. McDaniel, 80 F.3d 1261, 1270 (9th Cir. 1996).[3] This Court should now resolve the tension between Petrocelli, McKenna and Moran by concluding that the Nevada Supreme Court's application of its procedural default rules in Mr. Valerio's case cannot bar review of the merits of his constitutional claims.

This Court must conduct its own survey of the Nevada Supreme Court's

[2] The Nevada habeas statutes include procedural default rules directed against new claims that could have been raised previously, Nev. Rev. Stat. § 34.810(1)(b), and against claims raised again after being raised previously, § 34.810(2). They also require a habeas petition to be filed within a year of the judgment or finality on appeal, § 34.726, and impose a presumption of a bar arising from prejudice to the state if a petition is filed five year after judgment. § 34.800(2). The Nevada Supreme Court has generally defined "cause" to excuse a default as "an impediment external to the defense." E.g., Passanisi v. Director, 105 Nev. 63, 66, 769 P.2d 72 (1989).

[3] In fairness to the Moran panel, it was forced to resolve that question in a total of five days of litigation under an execution warrant; and some of the clear examples of inconsistent or discretionary application, such as the Bejarano decision, arose after the Moran decision. The Moran court also did not address the unpublished dispositions of the Nevada Supreme Court which are before this Court, and it relied on non-capital decisions -- in which the Nevada Supreme Court applies different rules -- in finding that the timeliness rules in capital cases were consistently applied. 80 F.3d at 1270.

decisions applying procedural rules in successor habeas proceedings in capital cases, in order to determine whether application of a procedural default rule is adequate to bar federal review. Fields v. Calderon, 125 F.3d at 764 (determining that California applied timeliness rules inconsistently after "conducting our own survey of . . . cases decided in the nine years preceding and including [the instant] appeal"), citing Johnson v. Mississippi, 486 U.S. 578, 587-589 (1998). Appellant submits along with this brief a request to take judicial notice of all the published and unpublished dispositions of which this Court took judicial notice in Petrocelli. JN Ex. 2.[4] There are thirty-one such dispositions, and review of the decisions shows that the Nevada Supreme Court administers its procedural default rules in a virtually random fashion.[5]

---

[4] Pursuant to Fed. R. Evid. 201, this Court may take judicial notice of these court records, and appellant has requested that this Court do so in a motion filed contemporaneously with this brief. Duckett v. Godinez, 67 F.3d 734, 741 (9th Cir. 1995) ("We may take judicial notice of proceedings in other courts, whether in the federal or state systems."); MGIC Indemnity Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986) ("We may take judicial notice of matters of public record outside the pleadings.") Exhibit references in this argument are to the exhibits attached to the request for judicial notice, cited as "JN Ex.". This Court must consider the Nevada Supreme Court's unpublished decisions in its analysis. That court cannot evade the consistency analysis of its dispositions merely by declining to publish them and making them uncitable on whether a state action is published. See n. 5, below.

[5] This case involves only the adequacy of default rulings in successive collateral proceedings in capital cases. The Nevada Supreme Court has held that it applies less stringent procedural default rules in capital cases, as this Court has recognized. Petrocelli v. Angelone, 248 F.3d at 887; see, e.g., Paine v. State, 110

(continued...)

In order for a state procedural default ruling to constitute an adequate state ground for the judgment, it must rest on a state rule that was "clear, consistently applied and well-established at the time of the petitioner's purported default," Calderon v. United States District Court (Bean), 96 F.3d 1126, 1129 (9th Cir. 1996), quoting Wells v. Maass, 18 F.3d 1005, 1008 (9th Cir. 1994); see generally Ford v. Georgia, 498 U.S. 4, 424 (1991); Johnson v. Mississippi, 486 U.S. 578, 587 (1988), so that litigants can properly be charged with knowledge of the standards with which they must comply. The state court system must also apply the default rules consistently, "because the federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce." Siripongs v. Calderon, 35 F.3d 1308, 1317-1318 (9th Cir. 1994); accord Fields v. Calderon, 125 F.3d 757, 760 (9th Cir. 1997); Morales v. Calderon, 85 F.3d 1387, 1389 (9th Cir. 1996); McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995). This rule has an equal protection basis as well: a state's disparate treatment of a single individual compared to others similarly situated, without a rational basis for the difference in treatment, violates the equal protection

---

[5](...continued)
Nev. 609, 615, 877 P.2d 1025 (1994) (considering issue despite law of the case "given the gravity of [the] sentence"); Emmons v. State, 104 Nev. 105, 108, 754 P.2d 836 (1988) (dispensing with contemporaneous objection rule "where a life is at stake"); Jones v. State, 101 Nev. 573, 580, 707 P.2d 1128 (1985).

guarantee of the constitution.[6] A default ruling that itself violates the constitution cannot be adequate to bar federal review of constitutional claims. See, e.g., Reece v. Georgia, 350 U.S. 85, 90 (1955).[7]

Most important for analyzing the Nevada situation, however, is the requirement that an adequate bar must be based on a rule, that is, on something that binds the state

---

[6] Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); see also Bush v. Gore, 531 U.S. 98, 104-109 (2000) (per curiam) (inconsistent treatment with respect to state law right to vote violates federal equal protection guarantee); Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990). Olech implicitly overrules cases allowing state default rulings to bar consideration of constitutional claims even if the state rule is not consistently applied to all cases, but merely to most cases. See, e.g., Dugger v. Adams, 489 U.S. 401, 411 n. 6 (1989); Moran v. McDaniel, 80 F.3d 1261, 1270 (9th Cir. 1996). If arbitrary application of such a rule to a single individual would violate the equal protection clause under Olech, that ruling could not be an adequate ground, in the constitutional sense, to support the state judgment. This equal protection issue need not be resolved, however, because it is clear that the application of state default rules here is inconsistent and discretionary and therefore inadequate to bar review.

[7] The question whether a default rule was in existence and clearly established focuses on the time that petitioner would have committed the alleged default, because this part of the adequacy analysis depends on the idea of fair notice: barring consideration of constitutional claims on the basis of a rule that did not clearly define the circumstances under which a default would be imposed would violate basic due process principles. The question whether a default rule is consistently applied focuses additionally on the practice of the state courts in ultimately applying the rule, including in the petitioner's case, see Dugger v. Adams, 489 U.S. at 411 n. 6, because this part of the analysis focuses on fair treatment: barring consideration of constitutional claims on the basis of a rule that is applied or not applied to similarly-situated petitioners, without a finding of a rational basis for the difference in treatment, would violate basic equal protection principles

courts to a principled course of action and not a "rule" that is in fact only an occasion for an exercise of unfettered and standardless discretion. Fields, 125 F.3d at 763-764; McKenna, 65 F.3d at 1318; Wells v. Maass, 28 F.3d at 1010; see also Russell v. Rolfs, 893 F.2d 1033, 1035-1036 (9th Cir. 1990) (noting exercise of state court's discretionary power rather than procedural bar).

II. THE NEVADA DISPOSITIONS IN CAPITAL COLLATERAL PROCEEDINGS SHOW THAT DEFAULT RULES ARE APPLIED INCONSISTENLY AND IN THE COURT'S UNFETTERED DISCRETION

The Nevada dispositions in capital cases demonstrate that the Nevada Supreme Court applies or does not apply its default rules without any rational explanation for differing treatment of similar cases and it treats the application of those rules as within its complete discretion.

Bejarano v. Warden (Bejarano II), 112 Nev. 1466, 929 P.2d 922 (1996) demonstrates that the Nevada Supreme Court does not consider itself actually bound by state procedural rules is. In Bejarano, the petitioner filed a second collateral proceeding, and on appeal from the denial of relief, the Nevada Supreme Court invoked every available default rule to bar consideration of the claims, including timeliness, new-claim successiveness, and previously-raised-claim successiveness rules. Id. at 1469-1470. But then, in a footnote on the last page of the decision, the

court decided one issue on the merits.[8] The court gave no explanation for why this claim, which was as untimely and as subject to the new-claim successiveness bar as every other new claim in the petition, had been singled out for review. The only possible explanation for the court's power to review this claim on the merits is that it has the absolute discretion to disregard defaults when it wishes to.

What is true for the treatment of individual claims within a petition is equally true with respect to the treatment of similarly-situated cases. In Hardison v. State, No. 24195, Order of Remand (May 24, 1994), JN Ex. 1-16, a successive collateral proceeding in a capital case that was adjudicated shortly before appellant's, the Nevada Supreme Court reversed a denial of relief in an order which ignored the procedural default rules -- both timeliness and successiveness bars -- that had been raised by the state. JN Ex. 3.[9] Simply disregarding defaults in capital collateral

---

[8] "One of Bejarano's claims during his second post-conviction proceeding was that his direct appeal counsel was ineffective. This court has considered this claim and has determined that it is without merit." 112 Nev. at 1471 n. 2.

[9] The Nevada Supreme Court's imposition of procedural defaults does not depend on presentation of that issue to the court. See Farmer v. State, No, 29120, Order Dismissing Appeal (November 20, 1997), JN 1-29 (citing default rules in case decided without briefing on appeal, see Nev. Rev. Stat. § 34.575(3) (habeas appeal submitted on record without briefing or argument unless ordered by court), in which district court had addressed merits of new claims).

proceedings is common.[10]

In Hill v. State No. 18253, Order Dismissing Appeal (June 29, 1987), JN Ex. 1-4, the petitioner defaulted his first collateral proceeding by failing to file a timely notice of appeal from the denial of relief. Citing nothing more than the "unique

---

[10] Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether failure to present such [mitigating] evidence constitutes ineffective assistance"); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules), JN Ex. 1-18; Farmer v. State No. 22562, Order Dismissing Appeal (February 20, 1992), JN Ex. 9 (denying claim of improper admission of victim impact evidence on merits despite default). See also Nevius v. Sumner (Nevius I) Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986), JN Ex. 1-2 (reviewing first and second collateral petitions in consolidated opinion, without addressing default rules as to second petition); Neuschafer v. Warden, No. 18371, Order Dismissing Appeal (August 19, 1987), JN Ex. 1-5 (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but decided to "elect" to entertain appeal due to "gravity of appellant's sentence"); Ybarra v. Director No. 19705, Order Dismissing Appeal (June 29, 1989), JR Ex. 1-7 (addressing previously-raised claim without reference to default rules); Williams v. State No. 20732, Order Dismissing Appeal (July 18, 1990) JR Ex. 1-8 (addressing claim in third collateral proceeding on merits without discussion of default rules).

The number of decisions in which the Nevada Supreme Court disregards defaults is larger than the decisions themselves indicate, because the court does not always acknowledge its action. E.g., Powell v. State, 108 Nev. 700, 705-706, 838 P.2d 921 (1992) (addressing issue of delay in probable cause determination without indicating that issue not raised at trial or on appeal, see Powell v. Nevada, 511 U.S. 79, 82-84 (1994)); Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994) (vacating aggravating factor finding based on instructional error on mandatory review error without noting issue not raised at trial or on appeal)

circumstances" of the capital case, the Nevada Supreme Court dismissed the untimely appeal but directed the trial court to entertain a successive petition. JN Ex. 1-4 at 2. On the appeal from the denial of relief in the second proceeding, the court ignored the timeliness and successive petition default rules that it had anticipatorily dispensed with in its first order. Hill v. State, 114 Nev. 169, 171 953 P.2d 1077 (1998). The court also addressed on the merits a claim that was raised for the first time on appeal from the denial of relief, on the ground that the issue was one of "constitutional dimension which, if true, might invalidate Hill's death sentence and 'the record is sufficiently developed to provide an adequate basis for review'." Hill, 114 Nev. at 178-179 (citation omitted); JN Ex. 1-30. Thus as to this claim, the Nevada Supreme Court disregarded three defaults -- timeliness, new-claim successiveness, and failure to raise the claim in the trial court at all -- without any stated basis for doing so other than the constitutional nature of the claim.

Similarly, in Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995), the court reviewed the merits of claims raised in the first collateral proceeding, over objections based on timeliness and new- and old-claim successiveness bars, in part on the theory that the merits of the claims were related to the issues of cause and prejudice to avoid any asserted defaults. But the court also used unmistakably discretionary language with respect to disregarding the default rules:

> "[T]here appears to be merit to the State's insistence that Bennett has not demonstrated good cause for failing to raise certain issues in prior proceedings and for revisiting issues that have already been decided by this court. . . . Without expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions. . . ."

111 Nev. at 1103 (emphasis added). The Nevada Supreme Court's use of discretionary terms to describe the basis of its disregard of default rules is consistent with its practice in all types of cases.[11]

This pattern is sufficient to show inconsistent application of procedural default rules,[12] and the unfairness of applying them to bar consideration of appellant's claims: Mr. Valerio is also under a capital sentence and he also raises constitutional claims,

---

[11] In fact, the Nevada Supreme Court's application of default rules to bar consideration of constitutional issues has always been discretionary. Stocks v. Warden, 86 Nev. 758, 760-761, 476 P.2d 469 (1978) (court "choose[s] to entertain" second post-conviction petitioner which could have been barred); Warden v. Lischko, 90 Nev. 221, 222, 523 P.2d 6 (1974) (trial court's "choice" to rule on barred claim "within its discretionary power"); Gunter v. State, 95 Nev. 886, 887, 620 P.2d 859 (1980) (court "obligated" to consider constitutional issues raised for first time on appeal); Hardison v. State, 84 Nev.125, 128 437 P.2d 868 (1968); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991) ("Normally, a proper objection is a prerequisite to our considering the issue on appeal. However, since this issue is of constitutional proportions, we elect to address it now.") (citation omitted).

[12] In six out of thirty-one successive collateral proceedings, or over 18%, the Nevada Supreme Court has simply dispensed with all applicable default rules without explanation. If all the successive capital habeas cases cited above, n. 10, are included, the figure is ten out of thirty-one, or almost a third.

and there is no rational distinction between his case and those in which defaults were disregarded to justify the difference in treatment under equal protection analysis. But the pattern also demonstrates the simpler point: the Nevada Supreme Court treats the application of all procedural default rules as a matter within its complete discretion. There is simply no other way to analyze the issue: if the Nevada Supreme Court can pick out an issue to review on the merits, that is as defaulted as all other claims, (Bejarano II); can ignore default issues altogether, (Hardison); and raise and adjudicate the merits of claims in collateral proceedings sua sponte (Bejarano I); then it is impossible to conclude that the Nevada procedural default bars are based on "rules" that actually bind the court.

In McKenna v. McDaniel, 65 F.3d 1483, 1488-89 (9th Cir. 1995), then-Chief Judge Hug correctly concluded that the Nevada Supreme Court always has discretion to hear the merits of a capital litigant's claims, and thus any procedural default invoked by the Nevada Supreme Court is "at best an exercise of discretion" and is inadequate to bar consideration of the merits of federal constitutional claims. Id. at 1488-89 (citing Pertgen v. State, 110 Nev. 554, 560, 875 P.2d 361 (1994) (holding court would overlook failure to comply with procedural rules governing post-conviction cases because case involved "ultimate punishment" and procedural arguments related to merits).) The cases cited above show that the Nevada Supreme

Court treats the application of the timeliness bar cited in Moran as equally discretionary, and applies it equally inconsistently, as the default rules at issue in McKenna and Petrocelli.

The Nevada Supreme Court's application of the excuses for its default rules exacerbates the arbitrary effect of the application of the rules themselves.[13] In Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997), JN Ex. 1-26, the Nevada Supreme Court held that ineffective assistance of counsel in a post-conviction proceeding would constitute cause if appointment of counsel in that proceeding was mandatory.[14] In McKague v. Warden, 112 Nev. 159, 165 n. 5, 912 P.2d 255 (1996), however, the court enunciated the same rule, but it did not apply it to Mr. McKague, even though his initial post-conviction petition was filed, like Mr. Crump's, before 1987, when appointment of counsel was still mandatory. On the other hand, in Bejarano II, the court held that ineffective assistance of counsel in post-conviction proceedings could not be cause if appointment of counsel was discretionary.

---

[13] A court's application of exceptions to its default rules is part of the inconsistency analysis. See Dugger v. Adams, 489 U.S. at 411 n. 6.

[14] Until 1987, appointment of counsel was mandatory in all initial post-conviction proceedings, under former Nev. Rev. Stat. § 177.345(1); from 1987 to 1992, appointment was discretionary in all cases; and beginning in 1993, appointment has been mandatory only in capital cases, under Nev. Rev. Stat. § 34.820(1). 1991 Nev. Stats. ch. 44 § 20 p. 87; 1987 Nev. Stats. ch. 539 § 42 p. 1230.

Bejarano v. Warden, 112 Nev. at 1470. But in Stevens v. State, No. 24138, Order of Remand (July 8, 1994) JN Ex. 1-17, the Supreme Court found cause to excuse a timeliness bar, that was vigorously raised by the state, and found by the trial court, JN Exs. 10 at 4-5; 12, based on a theory of absence of counsel in the initial collateral proceeding when appointment of counsel was not required, and after the petitioner had waived his right to post-conviction proceedings on the record and expressed the desire to pursue federal remedies instead. JN Ex. 1-17 at 2-3.[15] The only possible conclusion from this pattern is that inadequate counsel in a post-conviction proceeding is cause when the Nevada Supreme Court says it is, and not when it says it is not; and the Nevada Supreme Court exercises the same unfettered discretion in applying the exceptions to the default rules that it does in defining and applying the rules themselves.[16] Here again, Mr. Valerio sought to invoke an exception to any

---

[15] In its analysis of cause, the court also disregarded its rule that resort to federal proceedings does not constitute cause for delay in filing a state petition. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229 (1989).

[16] This conclusion is not limited to the inadequacy of counsel as cause: in another post-Moran case, the Nevada Supreme Court addressed substantive claims in a successor petition on the ground that continued representation by trial and appellate counsel in the post-conviction proceedings "arguabl[y]" established cause, Nevius v. Warden, Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition (October 9, 1996) JN Ex. 1-24 at 7, which is directly contrary to what it held in Moran. Moran v. State, No. 28188, Order Dismissing Appeal (March 21, 1996) JN Ex. 1-20 at 8-9.

default rule by asserting ineffective assistance of his first post-conviction counsel, see Valerio v. State, 112 Nev. at 388-389, but he was not given the benefit of the Stevens analysis.

In sum, the Nevada Supreme Court's language and its actions demonstrate that it does not consider itself bound to apply state procedural default rules in capital cases at any stage of the proceedings and that it applies them in its complete discretion. The pattern of its actions also establishes that it applies the default rules inconsistently. On either of these theories, this court must conclude that the Nevada procedural default rules applied in collateral proceedings in capital cases are inadequate to bar federal review of his constitutional claims, and it should accordingly disapprove Moran and follow McKenna and Petrocelli. As Justice Kennedy wrote in Lonchar v. Thomas, 517 U.S. 314, 323 (1996), "'There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges.' Opinion on the Writ of Habeas Corpus, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.)." Mr. Valerio's opportunity for federal review of his constitutional claims cannot depend on the Nevada Supreme Court's "Grace and Favour" in applying its default rules.

///

///

///

CONCLUSION

For the reasons stated above, in the briefing previously filed, and in the briefs filed by amicus curiae, appellant submits that this Court should reverse the judgment of the district court denying his petition for writ of habeas corpus.

Dated this 17th day of August, 2001.

Respectfully submitted,

Lawrence D. Wishart

Lawrence D. Wishart, Esq.
313 Flint Street
Reno, Nevada 89501

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately space 14-point. The total number of words is 4,822.

Dated this 17th day of August, 2001.

Respectfully submitted,

Lawrence D. Wishart

Lawrence D. Wishart, Esq.
313 Flint Street
Reno, Nevada 89501

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Federal Public Defender and on this 17th day of August, 2001, I served a copy of the foregoing **SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT** by mailing a copy thereof to:

David F. Sarnowski
Deputy Chief Attorney General
100 North Carson Street
Carson City, Nevada 89701

An employee of the Federal Public Defender

RECEIVED
AUG 20 2001
Federal Public Defender
Las Vegas, Nevada

CA NO. 98-99033

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,

Petitioner-Appellant,

vs.

ROBERT BAYER, *et al.*,

Respondents-Appellees.

D.C. No. CV-N-96-362-HDM
(Nevada, Reno)

Appeal from the United States District Court
for the District of Nevada
28 U.S.C. § 2254 Proceedings
(Death Penalty)

APPELLEES' SUPPLEMENTAL BRIEF

LAWRENCE D. WISHART
313 Flint Street
Reno, Nevada 89501

MARY BETH GARDNER
360 St. Lawrence
Reno, Nevada 89509

Attorneys for Appellant.

FRANKIE SUE DEL PAPA
Attorney General
DAVID F. SARNOWSKI
Chief Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (775) 684-1269

Attorney for Appellees.

TABLE OF CONTENTS

PAGE(S)

TABLE OF CASES AND AUTHORITIES CITED ii

I. STATEMENT OF THE ISSUES 2

II. ARGUMENT 2

A. Preface 2

B. The Nevada Supreme Court's Finding Of Procedural Default For The Majority Of Valerio's Claims Relies On "Independent And Adequate" State Grounds 4

C. The Nevada Supreme Court's Finding Of Procedural Default Constitutes An "Independent And Adequate State Ground" 9

III. CONCLUSION 15

STATEMENT OF RELATED CASES 16

CERTIFICATE OF COMPLIANCE 17

CERTIFICATE OF SERVICE 18

TABLE OF CASES AND AUTHORITIES CITED

CASES **PAGE(S)**

Bargas v. Burns,
179 F.3d 1207 (9th Cir. 1999) 2, 8, 9, 12, 15

Beets v. State,
871 P.2d 357 (Nev. 1994) 15

Bejarano v. Warden,
929 P.2d 922 (Nev. 1996) 15

Calderon v. U.S. District Ct. (Bean),
96 F.3d 1126 (9th Cir. 1996) 2, 3, 4, 5, 8, 9

Clark, In re,
5 Cal. 4th 750, P.2d 729 (Cal. 1993) 4, 5, 10

Dixon, In re,
41 Cal. 2d 756, 264 P.2d 513 (Cal. 1953) 5

Dugger v. Adams,
489 U.S. 401 (1989) 12, 14

Flanagan v. State,
754 P.2d 836 (Nev. 1988) 12

Ford v. Warden,
901 P.2d 123 (Nev. 1995) 15

Harris v. Reed,
489 U.S. 255 (1989) 15

Hill v. State,
953 P.2d 1077 (Nev. 1998) 13

Hogan v. Warden, Ely State Prison,
860 P.2d 710 (1993) 15

Jones v. State,
707 P.2d 1128 (Nev. 1985) 12

La Crosse v. Kernan,
244 F.3d 702 (9th Cir. 2001) 2

McKague v. Whitley,
912 P.2d 255 (Nev. 1996) 15

TABLE OF CASES AND AUTHORITIES CITED

CASES **PAGE(S)**

McKenna v. McDaniel,
65 F.3d 1483 (9th Cir. 1995) 2, 9, 10, 11, 12, 13, 14, 15

Michigan v. Long
463 U.S. 1032 (1983) 15

Morales v. Calderon,
85 F.3d 1387 (9th Cir. 1996) 4, 5

Moran v. McDaniel,
80 F.3d 1261 (9th Cir. 1996) 2, 9, 12, 14

Paine v. State,
877 P.2d 1025 (1994) 12

Pertgen v. State,
875 P.2d 361 (Nev. 1994) 9, 11, 12

Petrocelli v. Angelone,
248 F.3d 887 (9th Cir. 2001) 2, 9, 12, 13, 14, 15

Smith v. Stewart,
241 F.3d 1191 (9th Cir. 2001) 10

U.S. v. Zuno-Arce,
209 F.3d 1094 (9th Cir. 2000), *amended*, 245 F.3d 1108 (9th Cir. 2001) 11

Valerio v. State,
915 P. 2d 874 (Nev. 1996) 6, 7

Warden, Nevada State Prison v. Lischko,
523 P.2d 6 (Nev. 1974) 14

STATUTES

NRS Chapter 34 ..... 13, 14

NRS 34.810 ..... 12, 13, 14, 15

NRS 34.810(1) 7

NRS 34.810(2) 7

TABLE OF CASES AND AUTHORITIES CITED

STATUTES **PAGE(S)**

NRS Chapter 177 13
NRS 177.375 13
NRS 177.375(2)(b) 14
Statutes of Nevada 1967, 1449 13
Statutes of Nevada 1969, 108 13
Statutes of Nevada 1985, 1232 13
Statutes of Nevada 1987, 457 13
Statutues of Nevada 1973, 438 13

RULES

Ariz. R. Crim. Pro. 32.2(a) 10
Fed. R. App. P. 28 1
Fed. R. App. P. 30 1
Fed. R. App. P. 31 1
Fed. R. App. P. 32 1
Ninth Circuit Rule 22-1 10

CA NO. 98-99033

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, vs. ROBERT BAYER, *et al.*, Respondents-Appellees.	)	D.C. No. CV-N-96-362-HDM (Nevada, Reno)

APPELLEES' SUPPLEMENTAL BRIEF

Robert Bayer and Frankie Sue Del Papa, Respondents-Appellees ("State" or "Appellees") above-named, by and through counsel, Frankie Sue Del Papa, Attorney General of the State of Nevada, do hereby respond to the court's July 12, 2001 order to file a supplemental brief. This brief is filed pursuant to Fed. R. App. P. 28, 30, 31 and 32, and their counterpart rules found in the Rules of the United States Court of Appeals for the Ninth Circuit.

. . .

. . .

. . .

I. STATEMENT OF THE ISSUES

(1) Does the Nevada Supreme Court's finding of procedural default for the majority of Valerio's claims rely on "independent and adequate state grounds," in light of *Calderon v. U.S. District Ct. (Bean)*, 96 F.3d 1126, 1131 (9th Cir. 1996)?

(2) Does the Nevada Supreme Court's finding of procedural default constitute an "independent and adequate state ground" given the Ninth Circuit's holdings in *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995); *Moran v. McDaniel*, 80 F.3d 1261 (9th Cir. 1996); *Bargas v. Burns*, 179 F.3d 1207 (9th Cir. 1999); *see also Petrocelli v. Angelone*, 248 F.3d 887 (9th Cir. 2001)?

II. ARGUMENT

A. Preface.

In *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001), a unanimous three-judge panel considering the State of California's petition for writ of mandamus in a non-capital habeas proceeding, wrote[1]:

> In a federal habeas action brought by a state prisoner, federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the

[1] The following quote includes citations to cases included in the original as footnote citations.

judgment." Coleman v. Thompson, 501, U.S. 722, 729 (1991)...

For a state procedural rule to be "independent," the state law basis for the decision must not be interwoven with federal law. Michigan v. Long, 463 U.S. 1032, 1040-41 (1983); Harris v. Reed, 489 U.S. 255, 265 (1989). "A state law ground is so interwoven if 'the state has made application of the procedural bar depend on an antecedent ruling on federal law [such as] the determination of whether federal constitutional error has been committed.'" Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000) (quoting Ake v. Oklahoma, 470 U.S. 68, 75 (1985)). To be "adequate," the state procedural rule must be "strictly or regularly followed" and "consistently applied." Morales v. Calderon, 85 F.3d 1387, 1392 (9th Cir. 1996)...

Several years earlier, a different three-judge panel wrote in *Calderon v. U.S. District Ct. (Bean), supra*, a interlocutory capital case appeal:

"The procedural default doctrine is a specific application of the general adequate and independent state grounds doctrine." Wells v. Maass, 28 F. 3d 1005, 1008 (9th Cir. 1994). Under the adequate and independent state grounds doctrine, the United States Supreme Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729, 115 L.Ed. 2d 640, 111 S.Ct. 2546 (1991)...

Not all state procedural bars are "adequate" to foreclose federal review. For the procedural default doctrine to apply, "a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." Wells, 28 F.3d at 1010

> (citing Ford v. Georgia, 498 U.S. 411, 424, 112 L.Ed.2d 935, 111 S.Ct. 850 (1991) ("an adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied"))(other citation omitted). The reason for these requirements, we have explained, is that "it is grossly unfair—and serves none of the purposes of respect for procedural rules—to forfeit an individual's constitutional claim because he failed to follow a rule that 'was not firmly established at the time in question.'" English v. United States, 42 F. 3d 473, 478 (9th Cir. 1994) quoting Ford, 498 U.S. at 425).

With these general precepts in mind, the Appellees will address each of the questions posed by the court.

B. The Nevada Supreme Court's Finding Of Procedural Default For The Majority Of Valerio's Claims Relies On "Independent And Adequate" State Grounds.

In *Bean*, *supra*, the Ninth Circuit framed the issue as being "whether the procedural rules the California Supreme Court cited in denying Bean's state habeas petition were adequate to foreclose federal review of his claims." The court concluded that "[U]nder *Morales* [*v. Calderon*], California's timeliness rule, at least as applied to a pre-*Clark* procedural default, does not provide an adequate state ground barring federal review on the merits." The *Morales* court seized on the California Supreme Court's acknowledgment that no clear guidelines regarding departure from habeas corpus rules had emerged in past cases. From

this, the *Morales* court concluded that there were no discernible rules and thus the state court's timeliness requirements were not "clear, consistently applied, and well-established" before *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729 (Cal. 1993), was decided. *Morales v. Calderon*, 85 F.3d 1387, 1391 (9th Cir. 1996). From this, the *Morales* court then concluded the rules could "not serve as an adequate and independent ground sufficient to support a procedural default" to cases such as that of Morales, that were decided prior to *Clark*. *Id.* at 1393.

The *Bean* court then went on to note that it would not decide a second argument presented by California, namely, whether the rule of *In re Dixon*, 41 Cal. 2d 756, 264 P.2d 513 (Cal. 1953), was adequate to preclude review, because the California Supreme Court's terse order disposing of Bean's habeas appeal was ambiguous. It so held because the state court's order did not specify which of Bean's thirty-nine claims were rejected under one line of authority that prohibited raising habeas claims that unjustifiably were not raised on direct appeal, or were waived by failure to preserve them at trial, and which were rejected under a different line of authority that prohibits relitigation of claims during habeas corpus proceedings that had already been raised on direct appeal.

The holding in *Bean*, while apposite in a general sense, does not dictate the same conclusion in Valerio's case. The Nevada Supreme Court 4-1 majority

opinion in *Valerio v. State*, 915 P. 2d 874 (Nev. 1996), very carefully described which procedural bars applied to different sets of claims raised by Valerio in his second post-conviction habeas proceeding. The court said:

> As for the grounds among claims 1-18 which have not been determined on the merits, we hold that the district court properly dismissed these grounds pursuant to NRS 34.810 since Valerio could have raised them in his first petition, and his failure to do so constituted an abuse of the writ.
>
> We further hold that the district court did not err in dismissing those grounds among claims 1-18 which had been determined on the merits. These claims may not be raised again because this court's prior orders dismissing them constitute the law of the case. *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). This court specifically considered the issues that Valerio raised in his direct appeal in the order dismissing that appeal...In the order dismissing the appeal from denial of his petition for post-conviction relief, this court concluded that Valerio's claims of ineffective assistance at trial and on direct appeal were without merit...Valerio has failed to show cause why he was raising those claims again...
>
> The district court dismissed grounds 19-24 on the basis that "failure to assert the new grounds in a prior petition constituted an abuse of the writ." The court did not conclude that the direct appeal constituted a "prior petition." The court only concluded that the petition filed pursuant to NRS Chapter 177 was a "prior petition." A petition filed pursuant to NRS Chapter 177 has been considered to be a "prior petition" for purposes of NRS 34.810(2). *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994). The district court did not err in considering Valerio's Chapter 177 petition to be a "prior petition" for purposes of NRS 34.810(s).

> ...The district court concluded that the "good cause" for grounds 19-24 was insufficient, where Valerio essentially argued that he forgot to raise these claims earlier...
>
> ...[T]he district court here properly concluded that Valerio's claims were procedurally barred..."

Valerio v. State, 915 P.2d at 876.

It is apparent the Nevada Supreme Court affirmed the denial of Valerio's second collateral attack on the basis of procedural rules specified in NRS 34.810(1) and (2). The relevant portions of the statute were cited in the appellate decision, to the exclusion of any discussion of the so-called merits of any of the claims.

Therefore, unlike the problematic ruling in Bean's case, the Nevada Supreme Court's disposition of Valerio's abusive petition containing procedurally defaulted claims was unambiguous—the court rejected relief solely on the basis of well-established state statutory law. That law required dismissal of second or successive petitions if certain antecedent prerequisites existed: the filing of claims that could have been but were not presented to the trial court, or the filing of claims that were not presented on direct appeal or in a prior petition for post-conviction relief. This court has held that Nevada's statutory scheme clearly requires a petitioner to raise claims in a <u>first</u> post-conviction petition, and that

Nevada's rules are supported by an appropriate "jurisprudential concern" about piecemeal litigation such that dismissal ensues if the rules are not followed. Notably, this court cited statutes and cases dating back to the early 1970's in its holding, implicitly recognizing the long-standing practice adhered to in the Nevada courts. *Bargas v. Burns*, 179 F.3d 1207 (1999).

Second, unlike the problematic ambiguous ruling in Bean's case, the ruling in Valerio's case met the requirement that a procedural default be "separate and independent from any determination requiring interpretation or application of federal law." In other words, it was "purely a question of state law." *Id.*, at 1214. The Nevada Supreme Court discussed and rejected Valerio's various claims of cause—including the alleged ineffectiveness of his first post-conviction counsel—without delving into the merits of his federal claims. This approach was wholly consistent with the holding in *Bargas* and nothing in the state court's disposition contravenes the law of procedural default as set forth in *Bean*.[2] Therefore, this court must conclude the answer to its first query is a resounding "yes" since the Nevada Supreme Court relied on both independent and adequate grounds, within

[2] The *Bargas* court aptly observed that the mere fact a state court issues an alternative holding on the merits "in no way disturbs the independent state law ground for dismissal." In Valerio's last appeal, the Nevada courts did not even go that far since the disposition was solely on procedural grounds.

the context and meaning of *Bean*, when it found Valerio defaulted by raising claims in a second petition without good cause.

C. The Nevada Supreme Court's Finding Of Procedural Default Constitutes An "Independent And Adequate State Ground."

For the reasons stated above and that follow, the State will demonstrate that the holding in *Bargas, supra,* applies even in a capital case context, while the holdings in *McKenna* and *Petrocelli* do not undercut the lower court's determination that certain claims were procedurally barred. To the extent that this court's holding in *Moran* supports a general conclusion that certain procedural defaults are consistently applied in Nevada capital cases, it too applies although the same procedural default at issue in *Moran* is not now under consideration here.

In *McKenna*, this court concluded that the Nevada Supreme Court's exercise of discretion in *Pertgen v. State*, 875 P.2d 361 (Nev. 1994), demonstrated that it had erred by refusing to exercise the same discretion to hear McKenna's claim of error regarding the penalty phase jury instruction on depravity of mind. The circuit court concluded that "[T]he Nevada Supreme Court's statement that McKenna had waived this claim is, thus, necessarily intertwined with its analysis of the merits of McKenna's constitutional claims and does not constitute a clear statement of independent and adequate state grounds for the decision" and thus

that the federal courts were not "barred from examining the merits of McKenna's claims." *Accord*, *Smith v. Stewart*, 241 F.3d 1191, 1196 (9th Cir. 2001).[3] There are several reasons *McKenna* does not apply here.

First, the panel in this case has already addressed the merits of the very issue—the depravity of mind aggravator—on which the *McKenna* panel hinged its decision when it implicitly held that the Nevada Supreme Court had inconsistently applied its default rules. The panel in this case has decided all the issues for which the lower court issued a Certificate of Appealability. Thus, unless and until a COA is issued for any other issue subjected to a default analysis below, any consideration of the questions presented is nothing more than academic.[4]

Second, unlike the California court in *In re Clark*, *supra*, the Nevada Supreme Court has not conceded its application of the rules is inconsistent. Notably, in disposing of Valerio's last appeal the court noted its disagreement with the circuit court's decision in *McKenna* ("contrary to the assertion of the Ninth Circuit, we note this court has not inconsistently applied post-conviction

[3] The rules at issue in *Smith* are completely distinguishable from the Nevada rule at issue in Valerio's case, since Ariz. R. Crim. Pro. 32.2(a) required consideration of a claim's constitutional magnitude.

[4] The panel's now vacated disposition relied on Circuit Rule 22-1, and in the State's estimation, it correctly concluded that "there is no basis for considering uncertified

procedural bars"). It pointed out a significant discriminating factor overlooked or ignored by the *McKenna* panel, that is, that *Pertgen* and other cases require a petitioner to establish good cause and actual prejudice to overcome a procedural default. Thus, the actual holding in *Pertgen* hinged on the Supreme Court's legal conclusion that the petitioner had established cause—ineffective assistance of counsel—during his first collateral attack. As it so happened, unlike Valerio, whose jury found an unassailable second aggravating circumstance (a prior violent felony) and who had the benefit of a narrowing judicial construction of "depravity of mind" when the appellate court considered Valerio's first collateral appeal, Pertgen did not. In conclusion, the *McKenna* panel read too much into the Nevada court's dicta about "the ultimate punishment" and the court's ability to decide claims of plain error or of constitutional dimension *sua sponte.* The *McKenna* court also failed to recognize the unremarkable outcome of the state court collateral appeal in *Pertgen*, one based on a finding of "good cause" due to an

. . .

. . .

. . .

---

issues." *U.S. v. Zuno-Arce*, 209 F.3d 1094 (9th Cir. 2000), *amended*, 245 F.3d 1108 (9th Cir. 2001).

ineffective defense lawyer who failed to challenge the constitutionality of his client's sentence at the proper time.[5]

Likewise, the holding in *Petrocelli* does not undercut the lower court's holding that the Nevada Supreme Court's finding of default was both independent and adequate. While the *Petrocelli* court tried to harmonize the decisions in *Moran*, *McKenna* and *Bargas*, giving them all due regard and finding each applicable in at least limited circumstances, the State respectfully submits that much of the reasoning in *Petrocelli* cannot withstand careful scrutiny. First and foremost, the State asserts that the *Petrocelli* court took several Nevada cases and quoted from them out of context. Second, it failed to recognize significant differences in the rules under consideration in each case. Third, it did not conduct an analysis as required by *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989).

Paine v. State, 877 P.2d 1025 (1994); *Flanagan v. State*, 754 P.2d 836 (Nev. 1988); and *Jones v. State*, 707 P.2d 1128 (Nev. 1985), are all irrelevant to the analysis whether NRS 34.810 is regularly and consistently applied because

---

[5] The *Pertgen* court actually said that "[U]nder certain circumstances, a valid claim of ineffective assistance of appellate counsel may establish good cause such that we may review apparently meritorious issues that should have been raised on direct appeal. **Under the unique circumstances of this case**, we consider appellant's allegations to be sufficient to overcome this significant procedural hurdle." *Pertgen v. State*, 875 P.2d at 364. (Emphasis added).

they are direct appeal decisions. *Hill v. State*, 953 P.2d 1077, 1083-84 (Nev. 1998), involved a petition for post-conviction relief and not an action pursuant to NRS Chapter 34.[6] *Hill*, 953 P.2d at 1081. Therefore, *Hill* has no relevancy to the analysis.

In summary, quotations from the foregoing cases which were relied on by the *Petrocelli* panel were taken out of their proper procedural context. No case cited by the panel stands for or can be offered for the proposition that the procedural bar found in NRS 34.810 is anything other than adequate.

Second, the panel's analysis of Nevada cases relying on NRS 177.375 was improper. *McKenna* dealt with former NRS 177.375 and not NRS 34.810. Former NRS 177.375 is distinctly different from NRS 34.810. **NRS 34.810 mandates the dismissal**[7] of a petition if the state court makes certain determinations. *See* Statutes of Nevada 1985, 1232; 1987, 457. Former NRS 177.375 did not mandate dismissal. *See* Statutes of Nevada 1967, 1449; 1969, 108; 1973, 438. Rather, the statute stated that the claims were waived. *Id.*

---

[6] It is important to understand that for a period of time actions pursuant to NRS Chapter 177 (petitions for post-conviction relief) and NRS Chapter 34 (petitions for writ of habeas corpus (post-conviction)) co-existed, however, each had its own parameters and procedural bars.

[7] NRS 34.810 begins, "The court shall dismiss a petition if the court determines that:..." (Emphasis added).

The panel incorrectly stated that *McKenna*'s holding regarding discretionary application of the relevant procedural bars is supported by Nevada case law. The *Petrocelli* court relied on *Warden, Nevada State Prison v. Lischko*, 523 P.2d 6, 7 (Nev. 1974). *Lischko* has no application because it does not deal with NRS 34.810; it does not deal with a cause of action pursuant to NRS Chapter 34; and it fails to recognize that whatever judicial discretion may have existed with respect to former NRS 177.375(2)(b), such discretion does not apply under NRS 34.810 which ***mandates*** the dismissal of grounds upon certain determinations by the court.

Thirdly, the test for adequacy is whether the state procedural rule has been "strictly or regularly applied evenhandedly to the vast majority of similar claims." *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996), *citing Dugger v. Adams*, 489 U.S. 401, 410 n. 6 (1989). The precept that the "consistent or regular application" of a state's procedural default rules does not mean undeviating adherence to such rule admitting no exception. *Dugger*, 489 U.S. at 410 n.6 (1989).

The *Petrocelli* panel never specified whether or not NRS 34.810 was faithfully applied to the vast majority of cases raising the same type of constitutional claim in a second collateral attack, as required by *Dugger*. None of the cases relied

on by the *Petrocelli* court even address NRS 34.810.[8] Instead, this court analogized to an entirely different procedural bar, one not relied on by the Nevada Supreme Court in Valerio's case.

III. CONCLUSION

The Nevada Supreme Court's ruling meets the plain statement rule required by *Harris v. Reed* and *Michigan v. Long, supra*. The ruling does not rest primarily on, nor is it interwoven with federal law. Contrary to the conclusion of the *Petrocelli* and *McKenna* panels, the Nevada Supreme Court does not inconsistently apply its procedural default rulings in capital cases. *Bargas v. Burns* and NRS 34.810 fully apply to capital cases and bar consideration of claims not raised in a first petition regardless of the punishment.

RESPECTFULLY SUBMITTED this 16th day of August, 2001.

FRANKIE SUE DEL PAPA
Attorney General

By: David F. Sarnowski

DAVID F. SARNOWSKI
Chief Deputy Attorney General
Criminal Justice Division

---

[8] The State submits that NRS 34.810 is "regularly and evenhandedly" applied in capital cases. *Bejarano v.* Warden, 929 P.2d 922 (Nev. 1996); *McKague v. Whitley*, 912 P.2d 255, 258-60 (Nev. 1996); *Ford v. Warden*, 901 P.2d 123, 127 (Nev. 1995); *Beets v. State*, 871 P.2d 357, 358 (Nev. 1994); and *Hogan v. Warden, Ely State Prison*, 860 P.2d 710, 716 (1993).

STATEMENT OF RELATED CASES

Respondents-Appellees know of two cases that are related to this case. The first case is *Kou Lo Vang v. State of Nevada Attorney General,* Case No. 00-16639 (9th Cir.). It is related to this case in that the adequacy of Nevada's procedural default rules are at issue.

Second is *United States v. Zuno Arce*, Case No. 98-56770, and it is related to this case in that the applicability of Circuit Rule 22-1 is at issue.

RESPECTFULLY SUBMITTED this 16th day of August, 2001.

FRANKIE SUE DEL PAPA
Attorney General

By: David F. Sarnowski
DAVID F. SARNOWSKI
Chief Deputy Attorney General
Criminal Justice Division

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7)(C), I certify that the supplemental brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with a page or size-volume limitation established by separate court order dated July 13, 2001 and is:

X Proportionately spaced, has a typeface of 14 points or more and contains 3,360 words.

RESPECTFULLY SUBMITTED this 16th day of August, 2001.

FRANKIE SUE DEL PAPA
Attorney General

By: David F. Sarnowski
DAVID F. SARNOWSKI
Chief Deputy Attorney General
Criminal Justice Division

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 16th day of August, 2001, I served a copy of the foregoing SUPPLEMENTAL BRIEF by placing said document in the U.S. Mail, postage prepaid, addressed to:

LAWRENCE D. WISHART, ESQ.
313 Flint Street
Reno, Nevada 89501

MARY BETH GARDNER, ESQ.
360 Lawrence Street
Reno, Nevada 89509

MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101

RECEIVED
NOV 26 2001
Federal Public Defender
Las Vegas, Nevada

FILED
NOV 1 9 2001

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. JACKIE CRAWFORD, Director, et al., Respondents-Appellees.	Case No. 98-99033 D.C. No. CV-N-96-362-HDM (DEATH PENALTY CASE)

RECEIVED
NOV 26 2001
Federal Public Defender
Las Vegas, Nevada

SECOND SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT

FRANNY FORSMAN
Federal Public Defender
MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 388-6577

LAWRENCE D. WISHART, ESQ.
313 Flint Street
Reno, Nevada 89501
(775) 348-2070

Attorneys for Petitioner-Appellant

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page(s)

I. INTRODUCTION 1

II. THE NEVADA SUPREME COURT APPLIES DEFAULT RULES IN ALL CONTEXTS IN ITS UNFETTERED DISCRETION 3

III. THE UNPUBLISHED DISPOSITIONS IN CAPITAL COLLATERAL PROCEEDINGS DEMONSTRATE THAT THE NEVADA SUPREME COURT APPLIES ITS DEFAULT RULES INCONSISTENTLY AND IN ITS STANDARDLESS DISCRETION 6

A. Discretionary Application of Default Rules in Unpublished Cases. 6

B. Discretionary and Inconsistent Application of the Exceptions to the Default Rules. 13

IV. THE NEVADA SUPREME COURT'S PUBLISHED AND UNPUBLISHED DISPOSITIONS IN CAPITAL COLLATERAL PROCEEDINGS ARE INCONSISTENT AND ARE BASED ON EXERCISES OF STANDARDLESS DISCRETION 17

V. CONCLUSION 19

CERTIFICATE OF COMPLIANCE 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Page(s)

CASES

Bargas v. Burns, 179 F.3d 1207 (9th Cir. 1999) 5

Bejarano v. State (Bejarano I), 106 Nev. 840, 801 P.2d 1388 (1990) 12

Bejarano v. Warden, 112 Nev. 1466, 929 P.2d 922 (1996) ..... passim

Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995) 13

Boatwright v. Director, 109 Nev. 318, 849 P.2d 274 (1993) 5

Boulder City v. Cinnamon Hills Associates, 110 Nev. 238 (1994) 3

Bradley v. Romeo, 102 Nev. 103 (1986) 3

Bridgewater v. Warden, 109 Nev. 1159, 865 P.2d 1166 (1993) 5

Burke v. State, 96 Nev. 449, 611 P.2d 203 (1980) 5

Coleman v. Thompson, 501 U.S. 722 (1991) 14

Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989) 10, 17

Crow-Speiker #23 v. Helms, 103 Nev. 1, 731 P.2d 348 (1987) 3

Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997) 15, 17

Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169 (1991) 5

Desert Chrysler-Plymouth v. Chrysler Corp., 95 Nev. 640, 643-644, 600 P.2d 1189 (1979) cert. denied 445 U.S. 964 (1980) 3

Dromiack v. Warden, 96 Nev. 269, 607 P.2d 1145 (1980) 5

Dugger v. Adams, 489 U.S. 401 (1989) 13

Emil v. State, 105 Nev. 858, 784 P.2d 956 (1989) 4

Fields v. Calderon, 125 F.3d 757 (9th Cir. 1997) 2

Ford v. Georgia, 498 U.S. 411 (1991) 2

Ford v. Warden, 111 Nev. 872, 901 P.2d 123 (1995) 11, 18

Geary v. State, 110 Nev. 261, 871 P.2d 927 (1994) 4

Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1994) 4

Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981) 15

Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992) 4

Hardison v. State, 84 Nev. 125, 437 P.2d 868 (1968) 4

Hathorn v. Lovorn, 457 U.S. 255 (1982) 2

Hill v. State (Hill II), 114 Nev. 169, 953 P.2d 1077 (1998) 11

Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985) 4

Junior v. Warden, 89 Nev. 476, 515 P.2d 2 (1973) 10

Krewson v. Warden, 96 Nev. 886, 620 P.2d 859 (1980) 5

Lane v. District Court, 104 Nev. 427, 760 P.2d 1245 (1988) 4

Lane v. State, 114 Nev. 299, 956 P.2d 88 (1996) 4

Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991) 4

Martinez v. Klauser, 266 F.3d 1091 (9th Cir. 2001) 19

McCullough v. State, 99 Nev. 72, 657 P.2d 1157 (1983) 4

McKague v. Warden, 110 Nev. 159, 912 P.2d 255 (1996) 15

McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996) 5, 15

McKenna v. McDaniel, 85 F.3d 1387 (9th Cir. 1996) 19

Moran v. McDaniel, 80 F.3d 1261 (9th Cir. 1996) ..... passim

Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990) 2

Natchez v. State, 102 Nev. 247, 721 P.2d 361 (1976) 4

Paine v. State, 110 Nev. 609, 877 P.2d 1025 (1994) 4

Passanisi v. Director, 105 Nev. 63, 769 P.2d 72 (1989) 13

Passanisi v. State, 108 Nev. 318, 831 P.2d 1371 (1992) 5

Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001) 6, 19

Price v. Blaine Kern Artista, Inc., 111 Nev. 515, 893 P.2d 369 (1995) 3

Radovich v. W.U. Tel. Co., 36 Nev. 341, 135 P.2d 920 (1913) 3

St. Pierre v. State, 96 Nev. 887, 620 P.2d 1240 (1980) 4

Stocks v. Warden, 86 Nev. 758, 476 P.2d 469 (1978) 19

Summit v. State, 101 Nev. 159, 697 P.2d 1374 (1985) 4

Tahoe Village Homeowner's Assoc. v. Douglas County, 106 Nev. 660, 799 P.2d 556 (1990) 3

Tillema v. State, 112 Nev. 266, 914 P.2d 605 (1996) 4

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam) 2

Warden v. Lischko, 90 Nev. 221, 523 P.2d 6 (1974) 19

Weaver v. Warden, 107 Nev. 856, 822 P.2d 112 (1991) 5

Western Indus. Inc. v. General Ins. Co., 91 Nev. 222, 533 P.2d 473 (1975) .. 3

White v. State, 102 Nev. 153, 717 P.2d 45 (1986) 5

White v. State, 99 Nev. 760 670 P.2d 576 (1983) 5

Wilson v. Perkins, 82 Nev. 42, 409 P.2d 976 (1966) 3

Yates v. State, 103 Nev. 200, 734 P.2d 1252 (1987) 4

STATUTES

Nev. Rev. Stat. § 34.726 14

Nev. Rev. Stat. § 34.810 ..... passim

Nev. Rev. Stat. § 177.315(2) 10, 13

Nev. Rev. Stat. § 177.375(2) ..... passim

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. JACKIE CRAWFORD, Director, et al., Respondents-Appellees.	Case No. 98-99033 D.C. No. CV-N-96-362-HDM (DEATH PENALTY CASE)

I. INTRODUCTION

Pursuant to this Court's order of October 9, 2001, appellant submits the following briefing, showing that the unpublished dispositions support his argument, based on the published dispositions as well, that the Nevada Supreme Court enforces, or declines to enforce, all procedural default rules in capital collateral cases in its unfettered and standardless discretion.

Appellant discussed the law governing the adequacy of state default rules to bar federal review in the previous briefing, Supp. Br. at 2-6, and he will emphasize only these critical points. The requirement that a default rule be "clearly established" and "consistently" and "evenhandedly" applied in order to be adequate to bar federal review includes two principles. The rule must be clear in itself and "clearly

established" at the time the purported default occurred in order to satisfy the due process demand of adequate notice.[1] The rule must also be consistently applied, before or after the purported default,[2] in order to satisfy the equal protection demand of similar treatment of similarly situated litigants.[3] Although previous cases dealing with procedural default have indicated that a default rule may be adequate if it is applied in the "vast majority" of cases, even if not all, e.g., Moran v. McDaniel, 80 F.3d 1261, 1270 (9th Cir. 1996), the decision in Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam) recognizes that a violation of equal protection of the laws may occur if even one individual is treated differently than those similarly situated. These principles make it clear that the procedural rulings in Mr. Valerio's case cannot bar review of his federal constitutional claims: the Nevada Supreme Court has disregarded them in cases indistinguishable from appellant's; it has inconsistently applied them in capital collateral proceedings, fundamentally because it treats them as applicable or irrelevant in its complete, unfettered discretion; and

---

[1] E.g., Ford v. Georgia, 498 U.S. 411, 424 (1991); Fields v. Calderon, 125 F.3d 757, 761 (9th Cir. 1997).

[2] See Dugger v. Adams, 489 U.S. at 411 no. 6 (discussing state cases decided after purported default in determining whether rule applied consistently); id. at 419-420 (Blackmun, J., dissenting) (same).

[3] See Myers v. Ylst, 897 F.2d 417, 419, 421 (9th Cir. 1990); see also Hathorn v. Lovorn, 457 U.S. 255, 263 (1982) ("evenhandedly" applied).

thus, no one can know with any certainty what the default rules really proscribe, or how the often-unstated or undefined exceptions to the rules will be applied.

II. THE NEVADA SUPREME COURT APPLIES DEFAULT RULES IN ALL CONTEXTS IN ITS UNFETTERED DISCRETION

The discretionary application of the default rules in capital collateral proceedings is understandable in the context of Nevada procedural rules in general. Nevada does not have a tradition of stringent enforcement of procedural rules: to the contrary, while the Nevada Supreme Court expresses allegiance to procedural regularity, in practice it routinely disregards procedural rules for reasons that it does not express, or that would apply equally to all cases.[4]

---

[4] Even in civil cases, the Nevada Supreme Court disregards procedural rules when it wishes to, without identifying bases for its actions that rationally distinguish cases in which default rules are enforced from those in which they are not; nor does its exercise of that power necessarily depend on the presence of a constitutional issue. The court exercises essentially unlimited power to review errors sua sponte. Bradley v. Romeo, 102 Nev. 103, 105, 716 P.2d (1986). See, e.g., Price v. Blaine Kern Artista, Inc., 111 Nev. 515, 519, 893 P.2d 369 (1995) (court revives theory of liability sua sponte, declining "to penalize Price for his attorney's lack of acuity in conceding this issue."); Tahoe Village Homeowner's Assoc. v. Douglas County, 106 Nev. 660, 662 n. 1, 799 P.2d 556 (1990); Boulder City v. Cinnamon Hills Associates, 110 Nev. 238, 244, 871 P.2d 320 (1994) (court exercises its "prerogative" to address constitutional issues "only touched upon in the litigants' briefing papers"); Crow-Speiker #23 v. Helms, 103 Nev. 1, 3, 731 P.2d 348 (1987); Desert Chrysler-Plymouth v. Chrysler Corp., 95 Nev. 640, 643-644, 600 P.2d 1189 (1979) cert. denied 445 U.S. 964 (1980); Western Indus. Inc. v. General Ins. Co., 91 Nev. 222, 230, 533 P.2d 473 (1975); Wilson v. Perkins, 82 Nev. 42, 409 P.2d 976 (1966); Radovich v. W.U. Tel. Co., 36 Nev. 341, 348, 135 P.2d 920 (1913).

The Nevada Supreme Court exercises this "prerogative" in criminal cases, both on direct appeal and on appeal in post-conviction collateral proceedings. On direct appeal in all criminal cases, capital or non-capital, the Nevada Supreme Court has consistently held that it has the power to review constitutional claims despite any default in failing to raise the claim in the trial court, and the court also exercises its power to raise issues sua sponte in criminal cases despite the failure to raise them below or on appeal.[5]

---

[5] Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868 (1968) (court "obligated" to review constitutional issues even if not raised below); see, e.g., Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605 (1996) (non-capital); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991); St. Pierre v. State, 96 Nev. 887, 891, 620 P.2d 1240 (1980); McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157 (1983) (non-capital); Paine v. State, 110 Nev. 609, 615, 877 P.2d 1025 (1994); Geary v. State, 110 Nev. 261, 871 P.2d 927 (1994); Emil v. State, 105 Nev. 858, 867 n. 4, 784 P.2d 956 (1989) ("not clear" that contemporaneous objection rule applied in capital cases); Guy v. State, 108 Nev. 770, 785, 839 P.2d 578 (1992); Yates v. State, 103 Nev. 200, 207 n. 8, 734 P.2d 1252 (1987) (non-capital); Jones v. State, 101 Nev. 573, 580, 707 P.2d 1128 (1985); Summit v. State, 101 Nev. 159, 161 n. 2, 697 P.2d 1374 (1985) (non-capital); Natchez v. State, 102 Nev. 247, 251, 721 P.2d 361 (1976) (non-capital); McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157 (1983) (non-capital). In spite of these clear statements, the court applies even this rule inconsistently, sometimes in the same case. See Guy v. State, 108 Nev. at 783, 785 (addressing arguable prosecutorial misconduct not objected to at trial or specified on appeal, but declining to address instructional issue due to failure to object). See also Geary v. State, 112 Nev. 1434, 1438-1439, 930 P.2d 719 (1994) (reversing capital sentence bases on claims raised for first time on rehearing; court "elects" to consider issues beyond scope of order granting rehearing); Lane v. State, 114 Nev. 299, 303, 305, 956 P.2d 88 (1996) (similar); Lane v. District Court, 104 Nev. 427, 447, 760 P.2d 1245 (1988) (addressing due process claim raised for first time on rehearing in "interest of moving toward correct resolution of matter") (non-capital).

The Nevada Supreme Court exercises the same unfettered and standardless discretion in deciding whether to address claims in non-capital collateral proceedings as well.[6] What is true of collateral proceedings in non-capital cases is even clearer in capital cases.

---

[6] E.g., Burke v. State, 96 Nev. 449, 451 n. 1, 611 P.2d 203 (1980) (counsel's failure to create record in probation revocation to allow raising of constitutional issue held cause to excuse failure to raise issue before post-conviction petition, despite holding that counsel not ineffective in failing to preserve record); Krewson v. Warden, 96 Nev. 886, 887, 620 P.2d 859 (1980) (same); White v. State, 99 Nev. 760, 761, 670 P.2d 576 (1983) (allegations in post-conviction petition vague but court has power to address constitutional issues raised for first time on appeal from denial of petition); White v. State, 102 Nev. 153, 155-156, 717 P.2d 45 (1986) (addressing claim of invalidity of prior conviction raised on post-conviction, where not raised at trial and no appeal taken by same counsel, and only explanation offered was that counsel had failed to complete investigation of prior before time for taking appeal; no finding of cause based on ineffective assistance); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169 (1991) (claim of ineffective assistance not raised in post-conviction petition addressed on appeal due to "seriousness" of issues); Weaver v. Warden, 107 Nev. 856, 858, 822 P.2d 112 (1991) (addressing claims raised in habeas without discussion of delay in filing petition or failure to file post-conviction relief petition); Passanisi v. State, 108 Nev. 318, 323, 831 P.2d 1371 (1992) (reviewing claim of material mistake of trial court in imposing sentence on appeal from denial of motion to modify sentence, despite failure to raise claim on collateral review); Bridgewater v. Warden, 109 Nev. 1159, 1161, 865 P.2d 1166 (1993) (addressing issues on habeas not raised in post-conviction relief proceeding without discussion of cause); see also Boatwright v. Director, 109 Nev. 318, 849 P.2d 274 (1993) (unappealed dismissal of prior petition held not to bar subsequent petition); Dromiack v. Warden, 96 Nev. 269, 270-271, 607 P.2d 1145 (1980) (failure to appeal denial of post-conviction relief petition not bar to raising same claim in habeas petition); cf. McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255 (1996) (failure to file timely notice of appeal in first post-conviction barred consideration of second petition); Bargas v. Burns, 179 F.3d 1207, 1212 (9th Cir. 1999) (same; no citation to Boatwright or 1980 Dromiack decision).

III. THE UNPUBLISHED DISPOSITIONS IN CAPITAL COLLATERAL PROCEEDINGS DEMONSTRATE THAT THE NEVADA SUPREME COURT APPLIES ITS DEFAULT RULES INCONSISTENTLY AND IN ITS STANDARDLESS DISCRETION

A. Discretionary Application of Default Rules in Unpublished Cases.

The unpublished decisions in successive capital collateral proceedings corroborate what the published dispositions show, that is, that the Nevada Supreme Court does not treat default rules as binding its action whenever it decides not to follow them.

The most obvious example of the Nevada Supreme Court's refusal to treat default rules as binding is Hardison v. State, No. 24195, Order of Remand (May 24, 1994), JN Ex. 1-16.[7] Mr. Hardison filed a petition for post-conviction relief in 1989, alleging the ineffectiveness of trial counsel on a number of grounds relating to the

---

[7] In the previous request to take judicial notice, appellant submitted all of the Nevada Supreme Court's dispositions, published and unpublished, in successive collateral proceedings in capital cases up to the time of the briefing in Petrocelli in November, 1998, see Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001), which was essentially contemporaneous with the district court decision in this matter in August 1998. CR #81.

JN refers to appellant's request to take judicial notice of court records and the accompanying exhibits. Supp. JN refers to the supplemental request to take judicial notice of court records and accompanying exhibits, submitted in conjunction with this brief. Supp. Br. refers to the supplemental brief of petitioner-appellant filed on August 17, 2001. Appellant has included a summary of the relevant default statutes in an Addendum to this brief.

determination of guilt. The trial court denied relief, and the Supreme Court affirmed in an unpublished order in 1990. After Hardison sought federal habeas corpus relief he filed another, "amended" petition for post-conviction relief in the trial court, alleging claims of ineffective assistance. The trial court dismissed the petition on procedural grounds,[8] and on appeal the state urged that the claims had been waived under the statutory provisions cited by the trial court. JN Ex. 3 (Respondent's Answering Brief at 16-17).[9] The Nevada Supreme Court vacated the sentence and remanded the case for a new penalty trial in an unpublished order of remand, holding that trial counsel's failure to present any of the available mitigating evidence and his "questionable" closing argument in the penalty phase constituted ineffective assistance. JN Ex. 1-16 at 4-5.[10] The order contains no discussion of, or reference to, any issue of default - - the absence of any statutory authority for filing a second

---

[8] It ruled that Hardison had failed to show good cause for filing the post-conviction petition more than one year after the termination of the direct appeal; that he had failed to show cause for again raising the claims which had been raised and rejected in the first post-conviction proceeding; and that he had failed to show cause for failing to raise the new portions of the claim which had not been raised in the first post-conviction proceeding. See JN Ex. 3.

[9] If Mr. Hardison's default is treated as occurring during the pendency of his first petition, in 1989 to 1990, he is similarly situated to appellant Valerio, whose first petition was litigated between 1989 and 1992.

[10] The Nevada Attorney General's list of condemned inmates discloses that Mr. Hardison is now no longer on Nevada's death row.

"amended" post-conviction petition rather than a habeas petition, the untimeliness of the second post-conviction petition, the relitigation of claims previously raised, or the failure to raise the new claims in the first petition, see Addendum at 4-6, below - - or of any theory of cause and prejudice for excusing any of the defaults. See also Nevius v. Director (Nevius I), No. 17059, Order Dismissing Appeal (February 19, 1986) (dismissing appeals from denial of first and second petitions for collateral relief without addressing default rules as to second petition).

The importance of Hardison is not merely as an example of inconsistent application of the default rules; rather, it demonstrates that the Nevada Supreme Court does not consider the default rules as actually constricting its reviews. In Hardison, the trial court relied on statutory default provisions that were in unequivocal terms, see former Nev. Rev. Stat. § 177.375(2) (claims not raised in previous proceedings or raised and rejected "waived" unless cause demonstrated), Addendum at 7, and the state asserted the default rules on appeal.[11] The Nevada Supreme Court did not purport to find cause to overcome the defaults: it simply ignored them. Thus, Hardison shows that the default rules are not treated as rules at

---

[11] The Nevada Supreme Court's imposition of procedural defaults does not depend on the state's assertion of default issues on appeal to the court. See Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997), JN 1-29 (citing default rules in case decided without briefing on appeal, in which district court had addressed merits of newly-presented claims.)

all, since the Nevada Supreme Court is not bound to follow them when it does not wish to do so.

The Nevada Supreme Court similarly disregards defaults when it wishes to address individual claims in a successive collateral proceeding, even if it rejects the claims. In Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992) JN Ex. 1-9, the petitioner filed a second habeas petition raising a new Eighth Amendment claim. Despite the mandatory language in the habeas statute which was then in effect requiring dismissal of a petition raising new claims, Nev. Rev. Stat. § 34.810(2) (second or successive petition "must be dismissed" if it raises new claims), Addendum at 4-5, the Nevada Supreme Court simply ignored the default rules and addressed the merits. In Ybarra v. Director, No. 19705 (June 29, 1989), JN Ex. 1-7, the court addressed on the merits a challenge to the use of the M'Naghten test of sanity raised for the first time in a second collateral attack, again without addressing any issue of cause for failing to raise the claim in earlier proceedings, or addressing the mandatory dismissal rule of Nev. Rev. Stat. § 34.810 which was then in effect. Accord, Williams v. State, No. 20732, Order Dismissing Appeal (July 18, 1990), JN Ex. 1-8 at 3, (rejecting claim made for first time in third collateral proceeding, on ground that "the record clearly refutes appellant's post-conviction claims.")

In Neuschafer v. State, No. 16815, Order Dismissing Appeal (November 1,

1995), Supp. JN Ex. 4, the capital defendant's first habeas corpus petition was dismissed by the district court with leave to amend. Instead of amending the petition, counsel appealed the dismissal. The Nevada Supreme Court dismissed the appeal, holding that the petition "fail[ed] to articulate a claim based on ineffective assistance of counsel.". Without addressing any potential default issues arising from the failure to raise such a claim in the initial petition,[12] the court ruled that the petitioner would be allowed to file an amended petition in the trial court. Later, in Neuschafer v. Warden, No. 18371, Order Dismissing Appeal (August 19, 1987), JN Ex. 1-5, the court relied on the unexplained "without prejudice" dismissal of the first collateral attack as a basis for addressing the merits of the petitioner's claims, id. at 1, 5, again without indicating any basis for allowing the filing of the subsequent petition.[13] See

---

[12] See former Nev. Rev. Stat. § 177.375(2); Junior v. Warden, 89 Nev. 476, 477, 515 P.2d 2 (1973) (bar based on failure to raise claim in previous post-conviction relief petition under former Nev. Rev. Stat. § 177.375 applied to successive habeas corpus petition under ch. 34), Addendum at 3.

[13] The court also did not address the fact that almost two years elapsed between the court's dismissal of the appeal in the first proceeding and the filing of the second petition, while the petitioner had been engaged in federal litigation. See Nev. Rev. Stat. § 34.810(1)(b)(2) (claim barred if not presented in previous petition (in effect since 1985)); former § 177.315(2) (one year limitation on filing post-conviction relief petition); Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229 (1989) (litigating federal petition not cause for delay in filing state petition). Further, the court disregarded the likelihood that the appeal in the second proceedings taken by counsel was not properly before the court, because the petitioner had dismissed counsel in the district court, and "nevertheless elect[ed] not to decide that issue and to treat the appeal as

also Hill v State (Hill I), No. 18253, Order Dismissing Appeal (June 29, 1987), JN Ex. 1-4 (allowing filing of second collateral attack despite failure to perfect appeal in initial proceeding); Supp. Br. at 9.

These unpublished dispositions mirror the Nevada Supreme Court's practices in published decisions. As appellant showed previously, Supp. Br. at 6, 8-9, the published decisions include cases in which the Nevada Supreme Court, without explanation, has simply ignored default rules and addressed claims on the merits. Most obvious among these is Bejarano v. Warden, 112 Nev. 1466, 929 P.2d 922 (1996), in which the Nevada Supreme Court, applied default rules purportedly barring consideration of all of the petitioner's claims, but, without explanation, reviewed one claim on the merits. The state has failed to suggest any rational basis for the distinction in treatment between the claim that was reviewed on the merits, and those the court refused to review.[14] See also Ford v. Warden, 111 Nev. 872, 886-887, 901

---

one properly invoking our jurisdiction given the gravity of appellant's sentence." Id. at 6 (emphasis supplied). The point of the court's discussion of counsel's authority to proceed was that Mr. Neuschafer had dismissed counsel in the state district court and it was unclear at that time whether he was volunteering for execution. "Execution Looms for Nevada Inmate," Las Vegas Review Journal 1B, 6B (August 18, 1987)

[14] At oral argument, counsel for the state suggested that the distinction was that default rules had not been asserted as to that claim. That position is inaccurate. In the second collateral proceedings in the state district court and in the Nevada Supreme Court, default rules were not litigated only as to a claim of ineffective

P.2d 123 (1995) (addressing merits of claim attacking adequacy of mandatory review of death sentence on direct appeal, although claim raised for first time on appeal from the denial of a successive collateral petition and other claims in petition held defaulted; no explanation for treating that claim differently); Hill v. State (Hill II), 114 Nev. 169, 171, 953 P.2d 1077 (1998) (addressing merits of claim raised for first time on appeal from denial of second collateral petition, based on power to consider constitutional issues raised for first time on appeal if record sufficiently developed, without applying default rules relied on to reject remaining claims).

The Nevada Supreme Court's action in Hill II is consistent with its sua sponte review of the merits of claims on appeal in collateral proceedings, without regard to default rules. In Bejarano v. State (Bejarano I), 106 Nev. 840, 843, 801 P.2d 1388 (1990), on appeal from the denial of the first collateral petition, the Nevada Supreme Court sua sponte raised and rejected the issue of whether failure to present mitigating evidence constituted ineffective assistance of counsel at trial. Since that claim had not been raised in the post-conviction petition filed in the trial court, it would have been barred, absent a finding of cause, under the then-existing default rules, if it had

---

assistance of counsel in the initial post-conviction proceeding, Supp. JN, Exs. 1 at 3, 2 at 4 n. 1, 3 at 3. The claim reviewed on the merits by the Nevada Supreme Court was a different claim, of ineffective assistance of counsel on direct appeal. Id. at 1471 n. 2.

been raised in a subsequent petition.[15] But the Nevada Supreme Court did not even mention, much less apply, these default rules; again it simply ignored them.[16]

B. Discretionary and Inconsistent Application of the Exceptions to the Default Rules.

The application of exceptions to the default rules is also relevant to the adequacy inquiry,[17] and the Nevada Supreme Court's administration of its "cause" requirement to excuse procedural defaults is as confused as its application of the rules themselves. The Nevada Supreme Court has defined cause generally as "an impediment external to the defense," e.g., Passanisi v. Director, 105 Nev. 63, 66, 769

---

[15] Former Nev. Rev. Stat § 177.375(2); Nev. Rev. Stat. § 34.810(b)(2)(barring claims not raised in previous proceedings); former Nev. Rev. Stat. § 177.315(2) (requiring filing of initial petition within one year of judgment or disposition on appeal).

[16] Similarly, in Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995), the court exercised standardless discretion in addressing all of the claims raised on appeal from the denial of post-conviction relief, since it concluded that there was merit to the state's procedural arguments barring those claims, but decided that it could "choose" to address the merits anyway. See Supp. Br. at 9-10. But it also rejected a claim of ineffective assistance of counsel for failure to present mitigation, despite the absence of any allegations of what mitigating evidence could have been presented, by sua sponte concluding that it could not "imagine" what evidence could have been presented that would have made a difference. 111 Nev. at 1108. A claim raised in a later petition including specific allegations of such evidence ostensibly would have been subject to the timeliness and successiveness bars, but the Nevada Supreme Court simply pre-empted that inquiry.

[17] See Dugger v. Adams, 489 U.S. 401, 411 n. 6 (1989) (discussing application of exceptions to default rules); id. at 419-420 (Blackmun, J., dissenting) (same).

P.2d 72 (1989), but its decisions dealing with particular issues, particularly with respect to representation by counsel as cause, are inconsistent.

For instance, in Moran v. State, No. 28188, Order Dismissing Appeal (March 21, 1996), JN Ex. 1-20, the lawyers who represented the defendant at trial and on appeal also represented him in the first state collateral proceedings, in which they raised no claims of their own ineffective assistance. In the subsequent habeas proceeding, the Nevada Supreme Court held that the clear conflict of interest did not constitute cause to allow review of his constitutional claims.[18] Then, in Nevius v. Warden (Nevius II), Nos. 29027, 29028, Order Dismissing Appeal (October 9, 1996), JN Ex. 1-24, the court considered essentially the same situation, held that the conflict "arguably" established cause, and proceeded to address the merits of the petitioner's claims. Most recently, the Nevada Supreme Court decided a non-capital matter, Wade v. State, No. 37467, Order of Affirmance (October 11, 2001), Supp. JN Ex. 5. There, counsel who represented the defendant at trial and on direct appeal filed a habeas petition on his behalf. The district court dismissed the petition because it was not verified, and refused to allow an amended petition to be filed because it was outside the one-year limit of Nev. Rev. Stat. § 34.726. The Nevada Supreme Court

---

[18] This court held Mr. Moran's claims procedurally barred on the basis of that ruling. Moran v. McDaniel, 80 F.3d 1261 (9th Cir. 1996).

affirmed the dismissal; but it sua sponte raised the issue of the conflict of interest in trial and appellate counsel filing a habeas petition on the defendant's behalf, without explaining to the petitioner the potential results of representation by previous counsel, and held that the petitioner had cause to have a second habeas petition considered on the merits. Thus the Nevada Supreme Court's jurisprudence establishes that such a conflict so clearly constitutes cause to allow filing of a an untimely and successive petition that the court raises it sua sponte (Wade); that it "arguably" constitutes cause (Nevius); and that it does not constitute cause at all (Moran).

The Nevada Supreme Court has also held, based on federal authority before the decision in Coleman v. Thompson, 501 U.S. 722, 752-754 (1991), that ineffective assistance of counsel in post-conviction proceedings could excuse failure to raise claims. Grondin v. State, 97 Nev. 454, 456, 634 P.2d 456 (1981). Grondin was not explicitly overruled until 1996, Bejarano, 112 Nev. at 1469-1470; McKague v. Warden, 110 Nev. 159, 163, 912 P.2d 255 (1996); and the Nevada Supreme Court has now held in published opinions that ineffective assistance of counsel is not cause for filing a second petition unless appointment of counsel was mandatory in the first proceeding.[19] But between the Grondin decision in 1981, and at least 1996, there was

---

[19] Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997); Bejarano v. Warden, 112 Nev. at 1470. Appellant previously showed that the Nevada Supreme Court has not applied this rule consistently even in the published decisions, assuming

no clear authority whether ineffective assistance in post-conviction proceedings could constitute cause.

In an unpublished decision arising during this period, Stevens v. State, No. 24138, Order of Remand (July 8, 1994), JN Ex. 1-17, the initial post-conviction petition was filed in 1989, during the period in which appointment of counsel was discretionary and in the same year as appellant filed his first petition. After a delay in the appointment of counsel, the petitioner sought to dismiss the petition in order to proceed to litigation in federal court. He was canvassed by the trial court and withdrew his petition. Following federal habeas proceedings, Stevens filed a second petition, which was dismissed as untimely. The Nevada Supreme Court reversed the conviction and death sentence on the merits.[20] Although the appointment of counsel was discretionary at the time, the court held that it would have been an abuse of discretion not to appoint counsel to advise Stevens as to the effect of waiving his right to post-conviction proceedings, and thus that there was cause to overcome the

---

arguendo that it applies to his case. Supp. Br. at 12-13; compare Crump, supra (ineffective assistance cause if appointment of counsel mandatory) with McKague v. Warden, 112 Nev. 159, 165 n. 5, 912 P.2d 255 (1996) (ineffective assistance not considered cause, although first post-conviction petition filed during same period as Crump, when appointment of counsel mandatory).

[20] The Nevada Attorney General's list of condemned inmates shows that Mr. Stevens is no longer on Nevada's death row.

default in the untimely filing of the second petition.[21] At the time of Mr. Valerio's first petition, the validity of this theory of cause was completely unclear.[22] The Stevens cause analysis (which did not even cite Grondin) is fundamentally inconsistent with the rule applied in Crump, McKague and Bejarano, which was based on the discretionary appointment of counsel, just as the recent Wade decision is inconsistent with Nevius and Moran. In short, the definition of cause amounts, in practice, to whatever the Nevada Supreme Court in its unfettered discretion says it is in any particular case.

IV. THE NEVADA SUPREME COURT'S PUBLISHED AND UNPUBLISHED DISPOSITIONS IN CAPITAL COLLATERAL PROCEEDINGS ARE INCONSISTENT AND ARE BASED ON EXERCISES OF STANDARDLESS DISCRETION

The default rules the Nevada Supreme Court invoked to bar consideration of Mr. Valerio's claims, Nev. Rev. Stat. § 34.810, are the same rules it ignored, without explanation, in Mr. Hardison's case. Mr. Hardison had his claims reviewed, and his

---

[21] The court also included the period of time in which federal habeas proceedings were pending as covered by the cause finding, although the court had previously held that the period during which federal habeas proceedings were pending was counted against the time for filing a post-conviction proceeding. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229 (1989).

[22] Even in appellant's own case, the court did not clearly hold that ineffective assistance in post-conviction proceedings would not constitute cause, even though it cited McKague. Valerio v. State, 112 Nev. at 389 and n. 2.

sentence reversed, and he is no longer on death row; but the state contends that Mr. Valerio's death sentence is to be carried out while this Court is precluded from reviewing his constitutional claims at all. The state has never suggested a rational basis for this disparity in treatment; and this alone is sufficient to show that the default rulings in Mr. Valerio's case cannot be adequate to bar federal review, because applying them would violate equal protection under Village of Willowbrook v. Olech.

The Nevada Supreme Court's dispositions also demonstrate that the default rules are applied inconsistently.[23] The only possible conclusion is that, at least in this class of cases, application of the default rules is too inconsistent to bar federal review. While it is possible, of course, to pick out cases in which the default rules have in fact been applied, see Moran v. McDaniel, 80 F.3d at 1270, the cases in which they have not been applied -- sometimes the same cases, like Bejarano and Hill, in which they

---

[23] Of the thirty-one dispositions in successive capital collateral proceedings by the Nevada Supreme Court, it simply ignored default rules as to all or some claims in nine (or 29%) of those dispositions (Hardison, Farmer, Ford, Hill II, Bejarano II, Nevius I, Neuschafer, Ybarra, Williams). Adding cases in which the court anticipated and addressed claims that would normally have been raised in successive petitions (Bejarano I and Bennett), and cases in which the court excused defaults on bases that it had refused to recognize in other cases (Nevius II, Stevens), the number is thirteen out of thirty-one (or 42%). Even if the inconsistency shown by some of these cases were debatable, as a whole the dispositions demonstrate that the default rules are consistency applied in the "vast majority" of cases.

are both applied and disregarded - - demonstrate that the Nevada Supreme Court does not treat them as binding unless it wishes to apply them. Addressing a claim on a post-conviction appeal sua sponte, as in Bejarano I, or addressing a claim raised for the first time on appeal in a second post-conviction proceeding, as in Hill II, is fundamentally at odds with any conception of the default rules as actually binding the court.[24] Instead, every application of default rules in these cases results from "at best an exercise of discretion." McKenna v. McDaniel, 85 F.3d 1387, 1391 (9th Cir. 1996); see Petrocelli v. Angelone, 248 F.3d at 886.[25] Under these circumstances, the default rules invoked by the Nevada Supreme Court are not adequate to bar federal review of petitioner's claims. E.g., Martinez v. Klauser, 266 F.3d 1091, 1093-1094 (9th Cir. 2001).

V. CONCLUSION

For the reasons stated above, in the first supplemental brief, and at oral

---

[24] Such action also prevents the parties from complying with any statutory pleading requirements, see Nev. Rev. Stats. §§ 34.800(2) (pleading laches), 34.810(3) (pleading cause), which further demonstrates that the court treats statutory rules as irrelevant if it wishes to do so.

[25] Essentially, the Nevada Supreme Court has simply continued its policy of discretionary application of the default rules, despite their codification. Stocks v. Warden, 86 Nev. 758, 760-761, 476 P.2d 469 (1978) (court "choose[s] to entertain" second post-conviction petitioner which could have been barred); Warden v. Lischko, 90 Nev. 221, 222, 523 P.2d 6 (1974) (trial court's "choice" to rule on barred claim "within it's discretionary power").

argument, this Court must conclude that the Nevada Supreme Court applies all procedural default rules in capital cases in its complete and standardless discretion. Accordingly, this Court should reverse the district court's judgment, relying on default rulings to bar review of the merits of appellant's claims and remand the matter for further proceedings.

RESPECTFULLY SUBMITTED this 15th day of November, 2001.

FRANNY FORSMAN
Federal Public Defender



MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 388-6577
Attorneys for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately space 14-point. The total number of words is 5,798.

FRANNY FORSMAN
Federal Public Defender

MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 388-6577
Attorneys for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Federal Public Defender and on this 15th day of November, 2001, I served a copy of the foregoing **SECOND SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT** by mailing a copy thereof to:

David F. Sarnowski
Chief Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701

An employee of the Federal Public Defender

No. 98-99033

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, vs. ROBERT BAYER, Director of the Department of Prisons, E.K. McDANIEL, Warden, Respondents-Appellees.	)	D.C. No. CV-N-96-00362-HDM (DEATH PENALTY CASE)

RESPONDENTS' SUPPLEMENTAL BRIEF

FRANKIE SUE DEL PAPA
Attorney General of Nevada
ROBERT E. WIELAND
Senior Deputy Attorney General
1325 Airmotive Way, Suite 340
Reno, Nevada 89502
Tele: 775-688-1818

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 3

A. This Court Does Not Have Jurisdiction To Consider The Issues That This Court Has Ordered Addressed. 3

B. This Court Is Bound By The Nevada Supreme Court's Determination Of Nevada Law. 3

C. Valerio Failed To Present His "Evidence" To Either The State Courts Or To The Federal District Court Below. Therefore, This Court Can Not Consider The "Evidence." 4

D. The Principles Of Law Applicable To A Determination Of The Adequacy Of A Procedural Bar And The Legal Significance Of The "Exhibits". 8

CONCLUSION 19

CERTIFICATE OF COMPLIANCE 21

CERTIFICATE OF MAILING 22

TABLE OF AUTHORITIES

Page(s)

CASES

Allied Chemical Corp. v. Hess Tankship Co.
661 F.2d 1044 n.12 (5th Cir. 1981)---------- 12

Amos v. Scott
61 F.3d 333 (5th Cir. 1995), *cert. denied* 516 U.S. 1005 (1995) ---------- 9, 10

Andrews v. Deland
943 F.2d 1162 (10th Cir. 1991) ----------9

Byrd v. Delo
942 F.2d 1226 (8th Cir. 1991)----------9

Dugger v. Adams
489 U.S. 401 n.6 (1989)---------- 6, 9, 10, 13, 16

Emery v. Johnson
139 F.3d 191 (5th Cir. 1998) ---------- 16

Estelle v. McGuire
502 U.S. 62 (1991) ----------3

Harris v. Reed
489 U.S. 255 (1989) ---------- 5, 8, 9, 17

Hartman v. Summers
120 F.3d 157 (9th Cir. 1997) ----------3

Heath v. Helmick
173 F.2d 156 (9th Cir.1949)----------7

Jimmy Swaggart Ministeries v. Brd. Of Equalization
493 U.S. 378 (1990)---------- 11

Johnson v. Mississipp
486 U.S. 578 (1988) ----------5, 8, 9

Kennedy v. Delo
959 F.2d 112 (8th Cir. 1992), *cert. denied* 506 U.S. 857 (1992) ---------- 11

Kibler v. Walters
220 F.3d 1151 (9th Cir. 2000)---------- 10

Kirshner v. Uniden Corporation of America
842 F.2d 1074 (9th Cir. 1988)----------7

Lewis v. Jeffers
497 U.S. 764 (1990)----------3

Matthews v. Evatt
105 F.3d 907 (4th Cir. 1997), *cert. denied* 522 U.S. 833 (1997) ---------- 11

Milton v. Wainwright
407 U.S. 371 (1972)----------3

Morales v. Calderon
85 F.3d 1387 (9th Cir. 1996), *cert. denied*, 519 U.S. 1001 (1996) ---------- 10

Moran v. McDaniel
80 F.3d 1261 (9th Cir. 1996)----------3, 9, 13, 16

Murray v. Carrier
477 U.S. 478 (1986)----------8

Paradis v. Arave
954 F.2d 1483 (9th Cir. 1992)----------6

Pellegrini v. State
34 P.3d 519 (2001) ---------- 3, 4, 12

Poland v. Stewart
151 F.3d 1014 (9th Cir. 1998)---------- 10

Prihoda v. McCaughtry
910 F.2d 1379 (7th Cir. 1990)----------9

Pulley v. Harris
456 U.S. 37 (1984) ----------3

Reed v. Scott
70 F.3d 844 (5th Cir. 1995) ---------- 10

Scott v. Mitchell
209 F.3d 854 (6th Cir. 2000)----------9

Shumway v. Payne
223 F.3d 982 (9th Cir. 2000)----------9

Sloan v. Delo
54 F.3d 1371 (8th Cir. 1995)---------- 11

Smith v. Dixon
14 F.3d 956 (4th Cir. 1994) (en banc) *cert. denied* 513 U.S. 841 (1994)---------- 11

Sweet v. Delo
125 F.3d 1144 (8th Cir. 1997), *cert. denied* 523 U.S. 1010 (1998) ---------- 11

United States v. Duarte
1 F.3d 644 (7th Cir. 1993) ---------- 12

United States v. Walker
601 F.2d 1051 (9th Cir.1979) ---------- 7

Wainwright v. Sykes
433 U.S. 727 (1977) ---------- 8

Watson v. Rhode Island Ins. Co.
196 F.2d 254 (5th Cir. 1952) ---------- 7

Wells v. Mass
28 F. 3d 1005 (9th Cir.1994) ---------- 8

Williams v. Taylor
529 U.S. 420 (2000) ---------- 12

Wood v. Hall
130 F.3d 373 (9th Cir. 1997), *cert. denied* 523 U.S. 1129 (1998) ------ 10, 11, 15, 18

Wyldes v. Hundley
69 F.3d 247 (8th Cir. 1995), *cert. denied* 517 U.S. 1172 (1996) ---------- 11

Zichko v. Idaho
247 F.3d 1015 (9th Cir. 2001) ---------- 6

STATUTES

28 U.S.C. § 2253(c) ---------- 3

28 U.S.C. § 2253(c)(2) ---------- 3

28 U.S.C. § 2254(e)(1) ---------- 12

Fed. R. App. P. 10(a) ---------- 6

NRS 34.810 ---------- 2, 4, 5, 7, 12, 13, 14, 15, 16, 17, 18, 19

NRS 34.810(1)(a) ---------- 18

NRS 34.810(1)(b) ---------- 18

NRS 34.810(2) ---------- 18

NRS Chapter 177 ---------- 14

STATEMENT OF THE CASE

Having failed in his first state collateral attack on his conviction, Valerio brought a second attack. In his second attack, he raised a number of new issues, specifically, those found in Grounds 4-8, 10-12, and 18-24, parts b-g, j-l, n-r, t-x and z-kk of Ground 16, and parts a, c, e-i, and k of Ground 17. Because Valerio had not raised these grounds in his previous state collateral attack, they were procedurally barred pursuant to NRS 34.810 and he had the burden of showing good cause why he had not presented them in his earlier attack. The Nevada Supreme Court held that he had not carried his burden and, therefore, the grounds were procedurally barred. Court Record (hereinafter CR) 30, Exhibits FFF and YYY.

The federal district court found that the afore-listed claims were procedurally barred. CR 64, 76 and 79. Valerio has appealed from the district court's denial of his federal habeas petition.

In this appeal, Valerio requested that the court take judicial notice of various exhibits which had not been presented by Valerio either in state court or in federal district court. Respondents opposed the motion. Valerio replied. Valerio's request to take judicial notice was denied.

Following oral argument, the *en banc* court withdrew its previous order denying Valerio's request to take judicial notice of records and granted his request.

This *en banc* court has asked the parties to address in supplemental briefs "the legal significance" of the materials of which the court was now taking judicial notice. Exactly what is meant by "legal significance" is unexplained. In the instant context, where no certificate of appealability has been granted beyond that of the federal district court, many different meanings can be ascribed to such language. Additionally, it is unclear exactly what form the "judicial notice" will take. What relevance is this court going to ascribe to the exhibits or any single one? Respondents will do their best to address the court's order consistent with what Respondents believe to be this court's extra-jurisdictional concerns and Valerio's apparent claim, to wit, that the procedural bar applied in Valerio's case is not adequate because the Nevada Supreme Court does not consistently apply state procedural bars in death cases. As Respondents note below, according to the law of this circuit and that of the United States Supreme Court, Valerio's claim is not proper. The real issue is whether the procedural bar relied upon by the Nevada Supreme Court in Valerio's case, NRS 34.810, is adequate.[1] Notwithstanding that, Respondents do not waive any objections or arguments whatever.

Valerio has submitted his brief. Respondents now submit theirs.

///

[1] As will be shown below, the law of this circuit and the law established by the Supreme Court require that this court not inquire into the adequacy of other defaults that are not at issue.

ARGUMENT

A. This Court Does Not Have Jurisdiction To Consider The Issues That This Court Has Ordered Addressed.

For this court to properly consider the issues in question, a certificate of appealability must have been granted pursuant to 28 U.S.C. § 2253(c). Here, no court has issued a certificate of appealability. Furthermore, Valerio is required to make a substantial showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(2). He has not done so nor has this court required him to do so. As a result, there is no jurisdiction to consider the issues. *Slack v. McDaniel*, 529 U.S. 473 (2000).

B. This Court Is Bound By The Nevada Supreme Court's Determination Of Nevada Law.

A state's interpretation of its own laws is binding on this court. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Pulley v. Harris*, 456 U.S. 37, 41 (1984); *Milton v. Wainwright*, 407 U.S. 371, 377 (1972); *See Hartman v. Summers*, 120 F.3d 157, 161 (9th Cir. 1997); *Moran v. McDaniel*, 80 F.3d 1261, 1268 (9th Cir. 1996).

Recently the Nevada Supreme Court published *Pellegrini v. State*, 34 P.3d 519 (2001), a copy of which is appended hereto and is referenced herein. **That opinion, the statements and conclusions therein constitute the law of Nevada**

which is binding on this court. In its discussion of NRS 34.810, the Nevada Supreme Court stated that it has consistently applied the procedural bars found in NRS 34.810, that the language of NRS 34.810 is mandatory and that it had been consistent in requiring good cause and actual prejudice to overcome that procedural bar. *Pellegrini* at *56 and *57. To the extent that Valerio argues to the contrary, Valerio's argument must be rejected.

C. Valerio Failed To Present His "Evidence" To Either The State Courts Or To The Federal District Court Below. Therefore, This Court Can Not Consider The "Evidence."

Respondents lodge a continuing objection to this court's consideration of Appellant's so-called "evidence" because it was never presented either to the federal district court or to any of the state courts that considered Valerio's case. In short, Respondents object to this court's allowing Valerio to turn this appeal into a one-sided evidentiary free-for-all. The issue(s) that this court wishes the parties to address involves consideration of evidence that was not presented below and a determination of questions of fact and law which were not litigated below because Valerio made no attempt to properly litigate them. The cases cited by Valerio have no legal significance because they were not made part of the record below. Even though this court belatedly elected to take judicial notice of the exhibits, that effort does not allow this court to consider the exhibits as evidence or as a basis to

determine whether the procedural bar found in NRS 34.810 is adequate.

In his opposition to Respondents' motion to dismiss several of Valerio's claims because they were procedurally barred, Valerio's sole reference to any purported "inadequacy" of Nevada's procedural bar is found in Appellant's Appendix (hereinafter App.) at 76-81. Valerio, apart from reciting some law with respect to "adequacy," presented no evidence whatever to support his contention. Indeed, Valerio's contention was not that the Nevada Supreme Court inconsistently applied the procedural bars found in NRS 34.810 or any other Nevada procedural bar. Rather, Valerio's argument was that the statute itself was a violation of due process because it presumed "that any and every claim presented in a second or successive petition would necessarily have been decided on the merits if it had not been raised in a prior proceeding and by concomitantly presuming that any claim not decided on the merits in a prior proceeding was not raised for reasons constituting an abuse of the writ." *See* App. at 77. As Respondents noted in their reply, "Valerio does not contest that Nev. Rev. Stat. 34.810 is consistently or regularly applied to all constitutional claims. He also does not present any evidence that the procedural default rule is not consistently or regularly applied to the types of constitutional claims in his second petition." *See* CR 47 at 2.

A state procedural bar is presumptively adequate. *Harris v. Reed*, 489 U.S. 255, 262 (1989); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). NRS 34.810 is

the state procedural rule relied upon by the state district court and the Nevada Supreme Court to bar consideration of Valerio's claims. CR 30, Exhibit YYY. Valerio presented no evidence below to support his naked statement below that NRS 34.810 is not an adequate state procedural bar. CR 42. The burden was on him to present such evidence to rebut the presumed adequacy of the state procedural bar. *Dugger v. Adams*, 489 U.S. 401, 410, n.6 (1989), *Paradis v. Arave*, 954 F.2d 1483, 1493 (9th Cir. 1992), vacated on other grounds, 507 U.S. 1026 (1993); *Zichko v. Idaho*, 247 F.3d 1015, 1021 (9th Cir. 2001). Valerio's failure leaves this court with no alternative but to uphold the presumption that NRS 34.810 is an adequate procedural bar. *Dugger*, *Paradis*, and *Zichko*[2], supra.

Fed. R. App. P. 10(a) provides as follows: "Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases." This Court's Rule 10-2 provides, in pertinent part: "Pursuant to FRAP 10(a), the complete record on appeal consists of: ... (b) the district court clerk's record of original pleadings, exhibits and other papers filed with the district court ('clerk's record')." Ninth Cir. R. 10-2.

[2] To the extent that *Zichko* can be relied upon to suggest that this court can search for evidence that a state procedural bar has not been consistently applied, *Zichko* is incorrect.

In *Kirshner v. Uniden Corporation of America*, 842 F.2d 1074, 1077 (9th Cir. 1988), this Court held that, "[p]apers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal." *See also United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir.1979)(affidavits that "were not part of the evidence presented to the district court" would not be considered on appeal).

The "exhibits" offered by Valerio to support his belated effort to rebut the presumption that the procedural bar found in NRS 34.810 is adequate are not properly before this Court. *Kirshner*, 842 F.2d at 1076-77; *see also Walker*, 601 F.2d at 1055 ("We are here concerned only with the record before the trial judge when his decision was made.")(emphasis added); *Heath v. Helmick*, 173 F.2d 156, 156-57 (9th Cir.1949) (striking from record on appeal papers that were filed in district court after judgment from which appeal was taken)("The cause must be tried here upon the record made at the original trial."). Therefore, this Court should ignore the "exhibits" and give them no consideration in adjudicating this appeal. *See Watson v. Rhode Island Ins. Co.*, 196 F.2d 254, 256 (5th Cir. 1952)(court refuses to consider grounds for reversal evidenced in documents that have been stricken from record on appeal); *Heath*, 173 F.2d at 157 (court gives no consideration to stricken materials in disposing of appeal).

In its orders, the district court did not address Valerio's argument, probably

because it was patently absurd. This court must examine this case on the basis of the record before the federal district court. Such proper examination can only lead to the conclusion that Valerio did not rebut the presumption of the bar's adequacy. The record on appeal requires this court to affirm the federal district court's decision.

D. The Principles Of Law Applicable To A Determination Of The Adequacy Of A Procedural Bar And The Legal Significance Of The "Exhibits".

Where a petitioner fails to comply with a state procedural requirement, and the failure provides adequate and independent grounds for the state court's denial of relief, federal review of the issue will be barred where the state court has expressly relied on procedural default. *See Harris v. Reed*, 489 U.S. 255 (1989); *Murray v. Carrier*, 477 U.S. 478 (1986); *Wainwright v. Sykes*, 433 U.S. 727 (1977).

For a state procedural rule to be "adequate" to foreclose federal review, it must be "strictly or regularly followed." *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (internal quotations omitted). In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established[3] at the time of the petitioner's purported default. *Wells v. Mass*, 28 F. 3d 1005, 1010 (9th Cir.1994). The federal courts will limit their search for uniformly applied default to the same type of claim

[3] That the procedural bar(s) established by NRS 34.810 were well-established at the time of Valerio's default is beyond cavil. NRS 34.810 became law in 1985.

and will only ask whether the actual application of the default rule to all similar claims has been even-handed "in the vast majority of cases." *Dugger v. Adams*, 489 U.S. 401, 410-12, n.6 (1989); *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996). Not imposing the bar in one case does not demonstrate that the bar is not invoked in the vase majority of cases under *Dugger, supra. Shumway v. Payne*, 223 F.3d 982, 989 (9th Cir. 2000). Likewise, an occasional act of grace does not render a state rule inadequate to support a procedural bar. *Andrews v. Deland*, 943 F.2d 1162, 1190 (10th Cir. 1991). *See also Scott v. Mitchell*, 209 F.3d 854, 869 (6th Cir. 2000); *Byrd v. Delo*, 942 F.2d 1226 (8th Cir. 1991); *Prihoda v. McCaughtry*, 910 F.2d 1379 (7th Cir. 1990); and *Amos v. Scott*, 61 F.3d 333, 342 (5th Cir. 1995), *cert. denied* 516 U.S. 1005 (1995).

A state procedural rule enjoys a presumption of adequacy when the state court expressly relies on it in deciding not to review a claim for collateral relief. *Harris v. Reed*, 489 U.S. 255, 262 (1989); and *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988).

The federal court will limit itself to considering claims of inconsistency in a default to that particular default that is at issue and the court will not consider the alleged inconsistency in other defaults that are not at issue. *Dugger*, 489 U.S. at 410 n.6 (1989). *See also Moran v. McDaniel*, 80 F.3d 1261, 1269-70 (9th Cir. 1996).

See 1985 Statutes of Nevada 1232. Valerio murdered his victim in 1986.

The test for adequacy is whether the state procedural rule has been "strictly or regularly applied evenhandedly to the vast majority of similar claims." *Amos v. Scott*, 61 F.3d 333, 339 (5th Cir. 1995), *citing Dugger v. Adams*, 489 U.S. 401, 410 n. 6 (1989); *see also Reed v. Scott*, 70 F.3d 844, 846 (5th Cir. 1995). The "consistent or regular application" of a state's procedural default rules does not require undeviating adherence to such rule admitting no exception. *Dugger*, 489 U.S. at 410 n.6 (1989).

The fact that the application of a rule requires the exercise of judicial discretion does not render the rule inadequate to support a state decision. *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996), *cert. denied*, 519 U.S. 1001 (1996). This court has expressly rejected the characterization that a discretionary doctrine may never be an adequate procedural bar, holding that judicial discretion may be applied consistently when it entails "the exercise of judgment according to standards, at least over time, can become known and understood within reasonable operating limits." *Id. See also Wood v. Hall*, 130 F.3d 373, 376-377 (9th Cir. 1997), *cert. denied* 523 U.S. 1129 (1998) and *Kibler v. Walters*, 220 F.3d 1151, 1153 (9th Cir. 2000).

The application of a state procedural bar is a matter of state law; this court cannot consider whether the state court properly applied its default rules to the petitioner's facts. *Poland v. Stewart*, 151 F.3d 1014, 1018 (9th Cir. 1998); *Wood v.*

Naturally, Valerio's default occurred after 1986.

Hall, 130 F.3d 373, 378-79 (9th Cir. 1997), *cert. denied* 523 U.S. 1129 (1998); and *Sweet v. Delo*, 125 F.3d 1144, 1151 (8th Cir. 1997), *cert. denied* 523 U.S. 1010 (1998). As noted above, a state's interpretation of its own law is binding on a federal court in a habeas proceeding.

Even if a state procedure is available in limited circumstances, a petitioner must convince the federal court that his case is one of the exceptional cases the state court would consider to avoid a procedural default. *Kennedy v. Delo*, 959 F.2d 112, 116 (8th Cir. 1992), *cert. denied* 506 U.S. 857 (1992). And the existence of a special exception does not indicate that the rule is not routinely applied or that the exceptions are applied irregularly or arbitrarily. *See Jimmy Swaggart Ministeries v. Brd. Of Equalization*, 493 U.S. 378, 398-99 (1990); *Matthews v. Evatt*, 105 F.3d 907, 914-16 (4th Cir. 1997), *cert. denied* 522 U.S. 833 (1997); *Wyldes v. Hundley*, 69 F.3d 247, 252-53 (8th Cir. 1995), *cert. denied* 517 U.S. 1172 (1996); *Sloan v. Delo*, 54 F.3d 1371, 1378-80 (8th Cir. 1995); *Smith v. Dixon*, 14 F.3d 956, 972-973 (4th Cir. 1994) (en banc) *cert. denied* 513 U.S. 841 (1994).

"A state's misapplication of its habeas corpus rules is not cause for default," because "a federal court may not re-examine a state court's interpretation and application of state law." *Wood v. Hall*, 130 F.3d 373, 379 (9th Cir. 1997), *cert. denied* 523 U.S. 1129 (1998).

1) The Nevada Supreme Court has on several occasions declared that it

consistently applies Nevada's procedural bars, including NRS 34.810, and has done so in the context of capital litigation. The most recent declaration has come in *Pellegrini v. State*, 34 P.3d 519 (2001). That declaration also appears in Valerio's Exhibit 20 at 4-5, fn. 2; and in Exhibit 21 at 43, and settles a question of state law which is binding on this court. *Williams v. Taylor*, 529 U.S. 420 (2000).

Moreover, if this court is going take judicial notice of Valerio's exhibits for the purpose of determining whether or not Nevada's procedural bars are consistently applied in death cases, or, the proper question, whether the procedural bars actually applied in Valerio's case are strictly or regularly applied evenhandedly to the vast majority of similar claims, the Nevada Supreme Court's declaration is a factual finding binding on this court that can be rebutted only by clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). Suffice it to say that Valerio has not presented any evidence to the contrary, much less clear and convincing evidence.

2) This court does not have any jurisdiction to make a factual determination. If this court determines that the question whether or not the application of a state procedural bar is independent and adequate is a mixed question of law and fact, this court does not have jurisdiction to determine the fact(s) necessary to make that determination. *United States v. Duarte*, 1 F.3d 644, 649 (7th Cir. 1993); *Allied Chemical Corp. v. Hess Tankship Co.*, 661 F.2d 1044, 1050 n.12 (5th Cir. 1981).

3) A number of Valerio's exhibits have no legal significance to this case and do not apply to any analysis whether the procedural bar found in NRS 34.810 is adequate. These exhibits do not deal with the procedural bar that was applied to bar the subject claims in Nevada in Valerio's case. The federal court limits itself to considering claims of inconsistency in a default to that particular default that is at issue. The courts do not consider extraneous matters, such as the alleged inconsistency in other defaults that are not at issue. *Dugger*, 489 U.S. at 410 n.6 (1989). *See also Moran v. McDaniel*, 80 F.3d 1261, 1269-70 (9th Cir. 1996). Therefore, Valerio's argument, that this court must examine procedural bars other than the one applied to Valerio's claims in order to determine whether the one applied to Valerio's claims is adequate, is incorrect. Thus, even if this court had jurisdiction and the other procedural impediments to consideration of the issues did not exist, Valerio still has misstated the question. The proper method to determine the adequacy of a state procedural bar is to examine only that procedural bar and determine whether the actual application of that default rule to all similar claims has been even-handed "in the vast majority of cases.

The procedural bar that was applied to bar consideration of Valerio's claims is found in NRS 34.810. CR 30, Exhibit YYY. The alleged inconsistent application of other defaults is not at issue and, therefore, Valerio's reliance on cases not involving the application of NRS 34.810 is misplaced. Thus, Exhibits 1-2, 1-3, 1-4, 1-6, 1-7, 1-

8, 1-9, 1-12, 1-14, 1-16, 1-17, 1-30, 3, 10, 11, 12, and 13 which discuss or relate to procedural bars other than NRS 34.810 are irrelevant.

Exhibits 1-5 and 1-7 are orders dismissing appeals from the dismissal of a post-conviction petition for writ of habeas corpus which contains no discussion of NRS 34.810 or the discussion of any other procedural bar. These exhibits are irrelevant. They do not show that the application of NRS 34.810 or any other procedural bar was even the subject of the appeal or whether or not the petitioner-appellant had sufficiently shown cause or prejudice was ever an issue in the appeal.

Exhibits 1-2, 1-3, 1-4, 1-6, 1-8, 1-9, 1-12, 1-16, 1-17, 3, 10, 11, 12 and 13 are also irrelevant because they all relate to actions brought under a law which is no longer in effect, former NRS Chapter 177. (This can be seen by the exhibit's specific reference to NRS Chapter 177, by its reference in the document to a "petition for post-conviction relief" which indicates that the proceedings were under NRS Chapter 177, or by its reference to the case number in the exhibit which indicates that the document relates to an action relating to NRS Chapter 177).

Exhibits 6, 7, 8, and 9 are pleadings or documents relating to a direct appeal and, therefore, are irrelevant since they do not apply to an analysis of NRS 34.810.

Only Exhibits 1-10, 1-11, 1-13, 1-15, 1-18, 1-19, 1-20, 1-21, 1-22, 1-23, 1-24, 1-25, 1-26, 1-27, 1-28, 1-29, 1-31, 1-32, 1-33 even discuss NRS 34.810. If this court is going to examine any of the exhibits, only these exhibits should be

considered, and, even then, subject to the other limitations presented by Respondents herein. This court should note that in those exhibits, the Nevada Supreme Court discusses not whether the bar was properly applied[4], but whether the petitioner-appellant had been able to show cause or prejudice under the statute sufficient to overcome the procedural bar. In those cases in which NRS 34.810 is discussed, the procedural bar is applied. In actuality, the Nevada Supreme Court is simply affirming or rejecting the district court's determination that what was offered as either cause or prejudice in the petitioner's attempt to overcome the procedural bar was not adequate. That has nothing to do with whether or not the bar itself is adequate. Valerio's exhibits provide no evidence that the NRS 34.810 procedural bar is inadequate. As noted above, "[A] state's misapplication of its habeas corpus rules is not cause for default," because "a federal court may not re-examine a state court's interpretation and application of state law." *Wood v. Hall*, 130 F.3d 373, 379 (9th Cir. 1997), *cert. denied* 523 U.S. 1129 (1998).

4) Several of Valerio's exhibits do not even discuss Nevada procedural bars and, therefore, are irrelevant. Exhibit 1-1 is a draft order dismissing a mixed federal habeas petition. Exhibit 2 is a copy of an order showing that the panel in *Petrocelli* took judicial notice of court records, but just what those records were is

[4] In fact, in none of the cases did the petitioner-appellant ever assert that the bar was improperly applied. In each case, the appellant argued either that he had

not reflected in the order. Exhibit 4 is a copy of a motion for a certificate of appealability. Exhibit 5 is a copy of a motion to strike the motion for the certificate of appealability found in Exhibit 4. Exhibit 6, 7 and 8 are briefs in a direct appeal and Exhibit 9 is the order dismissing that direct appeal, none of which has anything whatever to do with NRS 34.810 or its applicability.

5) The four pie charts presented in Exhibit 1-34 have no legal significance because other than naked and conclusory statements regarding what the pie charts purport to represent, no foundation has been presented for them. This court cannot determine the truth or falsity of the statements for which they are offered, the method of analysis used to construct the charts, the cases the charts or the "analysis" relies on, or the manner in which the conclusions were deduced.

6) The orders upon which Valerio relies in his attempt to show that NRS 34.810 is irregularly applied, do not show that NRS 34.810 has been irregularly applied to claims similar to those that were barred in Valerio's case. *Dugger*, supra; *Moran*, supra; *Emery v. Johnson*, 139 F.3d 191, 202 (5th Cir. 1998). Valerio's Grounds 4-8 and 11 presented claims that several pieces of evidence were improperly admitted at trial. Ground 10 presented a claim that the trial prosecutor committed misconduct during argument. Ground 12 presented a claim that the state improperly released the victim's automobile and that prevented the

---

shown sufficient cause or prejudice, or both, to the lower court to overcome the

defense from checking to see if the keys found in Valerio's person fit that automobile. Grounds 16, and 18-24 presented claims of ineffective assistance of counsel. Ground 17 presented various claims of ineffective assistance of appellate counsel. The exhibits offered by Valerio disclose no irregular application to claims similar to those presented by Valerio.

7) Valerio's argument, that the Nevada Supreme Court has on occasion addressed the merits of claims even though they were also found to be procedurally barred, is of no consequence. A state procedural default will still bar federal habeas review if clearly and expressly invoked as a separate basis. *Harris v. Reed*, 489 U.S. 255, 264, n.10 (1989).

8) Examination of the exhibits that do discuss the procedural bars found in NRS 34.810, shows that in each case the petitioner-appellant had previously litigated a direct appeal, a post-conviction petition for relief, and/or a post-conviction petition for writ of habeas corpus or some combination thereof before he litigated the petition for post-conviction petition for writ of habeas corpus which is the subject of the appeal found in the exhibits. Without exception, in each case the procedural bar(s) found in NRS 34.810 was/were applied to claims which were not properly brought in the petition because the conviction was upon a plea of

---

bar.

guilty[5], to those claims which could have been raised in an earlier proceeding[6], and/or to a second or successive petition in which the judge determined that it failed to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds were alleged, the judge found that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ[7]. In each case, the Nevada Supreme Court examined whether or not the petitioner-appellant had shown good cause and prejudice as required by NRS 34.810 in order to overcome the procedural bar.

In actuality, Valerio's argument that NRS 34.810 is not consistently applied is merely a request that this court reconsider the Nevada Supreme Court's determinations regarding what constitutes cause and/or prejudice under Nevada state law to overcome the procedural bar. What constitutes cause and prejudice in the state proceedings to overcome any state procedural bar is a question of state law which cannot be relitigated in this court. *Wood v. Hall*, supra.

The exhibits reflect just what the Nevada Supreme Court has repeatedly stated: The Nevada statutory procedural bars, in particular NRS 34.810, are consistently applied and the Nevada Supreme Court has been consistent in requiring good cause and actual prejudice to overcome the statutory procedural

---

[5] NRS 34.810(1)(a)
[6] NRS 34.810(1)(b)
[7] NRS 34.810(2)

bars.

9) Valerio was ordered to address the legal significance of the "exhibits" that this court elected to take judicial notice of. Instead of writing his supplemental brief to such a discussion, Valerio has chosen to ignore this courts order by addressing other issues and presenting argument and cases beyond which this court has ordered. Those motions identified primarily as Section II of his brief including the footnotes therein and his references to other cases, and documents that this court has not taken judicial notice of, are irrelevant.

CONCLUSION

This court has no jurisdiction to consider the issues that are the subject of this court's order. Valerio's exhibits are of no legal significance for the reasons stated above. To the extent the exhibits have legal significance, they prove that the Nevada Supreme Court consistently applies the procedural bar that precluded consideration of Valerio's claims. Moreover, if this court were to consider the exhibits, the exhibits disprove Valerio's argument and prove that the Nevada Supreme Court has strictly or regularly applied evenhandedly to the vast majority of similar claims a procedural bar steeped in history and presently codified in NRS 34.810: that a claim that was not presented in the first available post-conviction proceeding or on direct appeal when it could have will be procedurally barred and

///

that bar may be overcome only by a showing of good cause for the failure to present the claim previously and prejudice.

RESPECTFULLY SUBMITTED this 19th day of December 2001.

FRANKIE SUE DEL PAPA
Attorney General

By: Robert E. Wieland

ROBERT E. WIELAND
Nevada Bar No. 890
Senior Deputy Attorney General
1325 Airmotive Way, Suite 340
Reno, Nevada 89502
Tele: (775) 688-1959

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Respondent's Supplemental Brief is:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 4,768 words and, pursuant to this court's order, does not exceed 20 pages ;

or

[ ] Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text);

or

[ ] In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

RESPECTFULLY SUBMITTED this 19th day of December, 2001.

FRANKIE SUE DEL PAPA
Attorney General

By: Robert E. Wieland

ROBERT E. WIELAND
Nevada Bar No. 890
Senior Deputy Attorney General
1325 Airmotive Way, Suite 340
Reno, Nevada 89502
(775) 688-1959

CERTIFICATE OF MAILING

I do hereby certify that I am an employee of the Office of the Attorney General and that on the 26th day of December, 2001, I served a true and accurate copy of the foregoing RESPONDENTS' SUPPLEMENTAL BRIEF by mailing via United States mail, first class, postage prepaid, to:

FRANNY A. FORSMAN
Federal Public Defender
MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101

LAWRENCE D. WISHART, ESQ.
313 Flint Street
Reno, Nevada 89501

An Employee of the
Office of the Attorney General

RECEIVED
...ERSON, CLERK
U.S. COURT OF APPEALS
JAN 22 2002
FILED
DOCKETED 1/22/02
DATE INITIAL

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,

Petitioner-Appellant,

v.

JACKIE CRAWFORD, Director, et al.,

Respondents-Appellees.

Case No. 98-99033
D.C. No. CV-N-96-362-HDM

(DEATH PENALTY CASE)

RECEIVED
JAN 28 2002
Federal Public Defender
Las Vegas, Nevada

SUPPLEMENTAL REPLY BRIEF OF PETITIONER-APPELLANT

FRANNY FORSMAN
Federal Public Defender
MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 388-6577

LAWRENCE D. WISHART, ESQ.
313 Flint Street
Reno, Nevada 89501
(775) 348-2070

Attorneys for Petitioner-Appellant

TABLE OF CONTENTS

Page

I. THIS COURT HAS JURISDICTION TO EXPAND THE CERTIFICATE OF APPEALABILITY TO ALLOW IT TO CONSIDER THE INADEQUACY OF STATE DEFAULT RULINGS TO BAR FEDERAL CONSTITUTIONAL REVIEW OF MR. VALERIO'S CLAIMS 1

II. THIS COURT MUST CONSIDER THE COURT RECORDS OF WHICH IT HAS TAKEN JUDICIAL NOTICE IN DETERMINING WHETHER THE NEVADA SUPREME COURT APPLIES DEFAULT RULES INCONSISTENTLY 2

III. THE STATE DOES NOT RESPOND TO THE MERITS OF APPELLANT'S ARGUMENTS SHOWING THAT THE NEVADA SUPREME COURT APPLIES ALL OF ITS DEFAULT RULES INCONSISTENTLY IN CAPITAL COLLATERAL CASES IN BOTH PUBLISHED AND UNPUBLISHED CASES 3

IV. THE STATE'S RELIANCE ON THE PELLEGRINI DECISION IS MISPLACED, BECAUSE PELLEGRINI ACKNOWLEDGES DISCRETIONARY LANGUAGE IN ITS PREVIOUS DEFAULT CASES, IT OFFERS NO RATIONAL EXPLANATION FOR THIS IRREGULAR APPLICATION OF DEFAULT RULES IN THE PUBLISHED CASES IT DOES DISCUSS, AND IT OFFERS NO EXPLANATION AT ALL FOR ITS DISREGARD OF PROCEDURAL RULES IN UNPUBLISHED DISPOSITIONS 6

A. The Pellegrini court admitted that its decisions supported the position in this Court's decisions in McKenna and Petrocelli by suggesting that application of its default rules is discretionary, and its actual practice supports that position as well. 6

B. The Pellegrini court's analysis of its previous dispositions does not and cannot show that the application of its default rules has been consistent. 8

1. The unpublished dispositions. 8

2. The published cases. 9

a. The Hill cases 9

b. The Bennett case 12

C. Conclusion. 14

IV. CONCLUSION 14

CERTIFICATE OF COMPLIANCE 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Page(s)

CASES

Bejarano v. State (Bejarano I), 106 Nev. 840, 807 P.2d 1388 (1990) 5, 11, 13

Bejarano v. Warden (Bejarano II), 112 Nev. 1466, 929P.2d 922 (1996) .. 5, 11, 12

Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995) 12, 13

Bridges v. State, 117 Nev. ___, 6 P.3d 1000 (2000) 10

Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997) 10

Couch v. Jabe, 951 F.3d 94 (9th Cir. 1991) 2

Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997) 12

Dugger v. Adams, 489 U.S. 401 (1989) 2

Fields v. Calderon, 125 F.3d 757 (9th Cir. 1997) 2

Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) 11

Holloway v. State, 117 Nev. ___, 6 P.3d 987 (2000) 10

In re Clark, 5 Cal.4th 750, 855 P.2d 729 (1993) 7

Johnson v. Mississippi, 486 U.S. 578 (1988) 2

McKenna v. McDaniel, 65 F.3d 1483 (9th Cir. 1995) 8

Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996) 2, 4, 7, 14

Pellegrini v. State, 117 Nev. ___, 34 P.3d 519 (2001) 3, 7-13

Pertgen v. State, 110 Nev. 554, 875 P.2d 361 (1994) 7, 11

Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001) 8

Sloan v. Delo, 54 F.3d 1371 (9th Cir. 1995) 4

Smith v. Stewart, ___ U.S. ___, (December 12, 2001) 3

United States v. Flores-Payon, 942 F.2d 556 (9th Cir. 1991) 2

Valerio v. State, 112 Nev. 383, 915 P.2d 874 (1976) 5

Warden v. Lischko, 90 Nev. 221, 523 P.2d 6 (1974) 7

Wood v. Hall, 130 F.3d 373 (9th Cir. 1997) 3

STATUTES

Nev. Rev. Stat. § 34.726(1) 12

Nev. Rev. Stat. § 34.810(1)(b) 11

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. JACKIE CRAWFORD, Director, et al., Respondents-Appellees.	Case No. 98-99033 D.C. No. CV-N-96-362-HDM (DEATH PENALTY CASE)

I. THIS COURT HAS JURISDICTION TO EXPAND THE CERTIFICATE OF APPEALABILITY TO ALLOW IT TO CONSIDER THE INADEQUACY OF STATE DEFAULT RULINGS TO BAR FEDERAL CONSTITUTIONAL REVIEW OF MR. VALERIO'S CLAIMS

The state argues in its current supplemental brief that this Court has no jurisdiction to review the issue of the adequacy of Nevada's procedural default rules because that issue was not in the original certificate of appealability issued by the district court. The briefing previously submitted shows that this Court indisputably has the authority to expand the scope of the COA, and that current Circuit Rule 22-1, which was adopted after the appeal in Mr. Valerio's case was pending in this Court, cannot properly be used to bar expansion of the COA to allow consideration of this issue. Since the state offers no new argument on this point, no reply is necessary.

///

II. THIS COURT MUST CONSIDER THE COURT RECORDS OF WHICH IT HAS TAKEN JUDICIAL NOTICE IN DETERMINING WHETHER THE NEVADA SUPREME COURT APPLIES DEFAULT RULES INCONSISTENTLY

The state does not address appellant's arguments that the adequacy of state procedural default rules to bar federal review is a question of law, see Couch v. Jabe, 951 F.3d 94, 96 (9th Cir. 1991) (whether state ruling rests on default grounds presents question of law); see also Morales v. Calderon, 85 F.3d 1387, 1389 n. 6 (9th Cir. 1996), which this Court reviews de novo on appeal. E.g., Fields v. Calderon, 125 F.3d 757, 759-760 (9th Cir. 1997); Morales v. Calderon, 85 F.3d 1387, 1389 n. 6 (9th Cir. 1996). The state cites no authority for its assertion that this Court has no power to address a purely legal issue for the first time on appeal, and the settled law is to the contrary. E.g., United States v. Flores-Payon, 942 F.2d 556, 558 (9th Cir. 1991).

The state's continuing objection to this Court considering the material of which it has taken judicial notice disregards this Court's obligation to conduct its own survey of the available state decisions in deciding the issue before it. See Fields v. Calderon, 125 F.3d 757, 761, 764 (9th Cir. 1997); Johnson v. Mississippi, 486 U.S. 578 (1988); Dugger v. Adams, 489 U.S. 401, 411 n. 6 (1989). The state also ignores the fact that the records of which this Court has taken judicial notice are not normal evidence that is subject to dispute: the published and unpublished dispositions of the

Nevada Supreme Court say what they say, and there can be no reasonable dispute about their terms; and the legal analysis focuses on whether those decisions show inconsistent or purely discretionary application of Nevada procedural default rules in general and with respect to the defaults that were invoked in Mr. Valerio's case. Nothing in the state's supplemental brief suggests why the pattern of inconsistency shown by the published and unpublished decisions should be ignored in this analysis.

III. THE STATE DOES NOT RESPOND TO THE MERITS OF APPELLANT'S ARGUMENTS SHOWING THAT THE NEVADA SUPREME COURT APPLIES ALL OF ITS DEFAULT RULES INCONSISTENTLY IN CAPITAL COLLATERAL CASES IN BOTH PUBLISHED AND UNPUBLISHED CASES

The state argues that the Nevada Supreme Court's decision in Pellegrini v. State, 117 Nev. ___, 34 P.3d 519 (2001), constitutes the state law on procedural default in Nevada which is binding on this Court, and that, because the Pellegrini decision asserts that the state courts do apply procedural default rules consistently, this Court cannot conclude otherwise. Resp. Supp. Br. at 3-4.

Appellant acknowledges that state courts have the final word on what state law is, and he has never argued otherwise: the law on that point is clear.[1] But the issue

---

[1] E.g., Wood v. Hall, 130 F.3d 373, 378-379 (9th Cir. 1997); see also Smith v. Stewart, ___ U.S. ___, 2001 WL 1046498 (December 12, 2001) (per curiam) (certifying question of scope of state law exception to default rule without suggesting that state law controlled issue of adequacy of procedural default to bar review under federal law).

before this Court is not a question of state law: whether a state procedural default ruling is adequate to bar federal review is a question of federal law.[2] Thus, this Court is required to accept the Pellegrini decision as constituting the current state law on procedural default (however incomprehensible that decision may be in light of the Nevada Supreme Court's previous practices); but this Court cannot accept the Nevada Supreme Court's characterization of its dispositions as consistent: this Court's own analysis of that federal issue will show that the Nevada Supreme Court's dispositions are inconsistent and that its rules were not so clearly established at the time of Mr. Valerio's purported default to be adequate to bar review of his constitutional claims. Morales, 85 F.3d at 1392. The state does not even acknowledge this rule of law, so there is nothing on this point to which appellant can reply.

The state's argument on the merits also ignores most of the arguments made by appellant. The state does not attempt to offer a substantive distinction between petitioner's case, in which defaults were invoked, and cases like Hardison and Stevens in which the Nevada Supreme Court ignored defaults or excused them on grounds not recognized in appellant's case. See Supp. Brief of Petitioner-appellant

---

[2] E.g., Sloan v. Delo, 54 F.3d 1371, 1379 (9th Cir. 1995); see Morales v. Calderon, 85 F.3d at 1392 ("we emphasize that the issue here is not whether the State is allowed to invoke its rule irregularly for its own purposes. The question is whether invocation of a state rule that is applied only randomly may preclude a federal court from entertaining a petitioner's federal claim on the merits.").

at 6-10; Second Supp. Br. of Petitioner-appellant at 8-12.[3] Nor does the state suggest a rational basis for the disparity in treatment in cases like Bejarano v. State (Bejarano I), 106 Nev. 840, 843, 807 P.2d 1388 (1990) (reviewing claims sua sponte on appeal from denial of post-conviction relief) and Bejarano v. Warden (Bejarano II), 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (reviewing one claim despite default applicable to all claims), in which the Supreme Court reviewed some claims but not others. See Supp. Br. of Petitioner-appellant at 9-12. As appellant has shown in the previous briefing, the Nevada Supreme Court has historically exercised the power to disregard all applicable default rules, including timeliness bars and bars based on failure to raise claims in earlier proceedings, as to any kind of claim and as to any stage of collateral proceedings. The point of this demonstration is that all the Nevada default rules - - including the specific ones that were invoked to bar appellant's claims - -

---

[3] The state argues that Hardison, for instance, is not relevant because it arose under the post-conviction relief proceedings under former Chapter 177 and the Nevada Supreme Court did not invoke the default provisions of Chapter 34. Resp. Supp. Br. at 14. But this is precisely appellant's point: for no apparent reason, the Nevada Supreme Court reviewed the merits of Hardison's second petition without regard to the successive petition default rules, while it applied those default rules to appellant's case. See Valerio v. State, 112 Nev. 383, 387-388, 915 P.2d 874 (1976) (Chapter 177 petition is previous petition for purpose of successive petition bar of Chapter 34). The fact that Hardison's second petition was filed under Chapter 177 (which contained no provision at all allowing successive petitions) rather than Chapter 34 (which contained the successive petition default rules) proves only that the Nevada Supreme Court disregarded the lack of any authority for filing a second Chapter 177 petition as well as the default rules based on timeliness and successive petitions in Hardison.

have not been considered "rules" at all, but have been imposed or disregarded entirely in the Nevada Supreme Court's standardless discretion, and therefore that none of these rules can be adequate to bar federal review. The state's brief does not address this argument, and appellant submits that this Court should recognize that there is simply no argument for the state to make on this issue.

IV. THE STATE'S RELIANCE ON THE PELLEGRINI DECISION IS MISPLACED, BECAUSE PELLEGRINI ACKNOWLEDGES DISCRETIONARY LANGUAGE IN ITS PREVIOUS DEFAULT CASES, IT OFFERS NO RATIONAL EXPLANATION FOR THIS IRREGULAR APPLICATION OF DEFAULT RULES IN THE PUBLISHED CASES IT DOES DISCUSS, AND IT OFFERS NO EXPLANATION AT ALL FOR ITS DISREGARD OF PROCEDURAL RULES IN UNPUBLISHED DISPOSITIONS

The state relies on the Nevada Supreme Court's recent decision in Pellegrini as establishing that the court applies its default rules consistently. The Pellegrini decision in fact shows exactly the contrary: it acknowledges that the court's previous decisions suggest that its application of default rules is discretionary; and its attempt to analyze its previous decisions only highlights the confusion and inconsistency appellant has shown.

A. The Pellegrini court admitted that its decisions supported the position in this Court's decisions in McKenna and Petrocelli by suggesting that application of its default rules is discretionary, and its actual practice supports that position as well.

Most important, the Pellegrini court acknowledged that language in previous

decisions indicated that the Nevada courts had discretion to consider the merits of constitutional claims despite the existence of procedural bars. As a result, the court found it necessary to overrule Warden v. Lischko, 90 Nev. 221, 222-223, 523 P.2d 6 (1974) and disapprove language in Pertgen v. State, 110 Nev. 554, 560, 875 P.2d 361 (1994), and to hold explicitly that application of the post-1985 statutory default rules is mandatory. Pellegrini, 34 P.3d at 536. The Nevada Supreme Court's acknowledgment that its previous decisions suggested that application of its default rules was discretionary compels that conclusion that the default rules that the court now characterizes as mandatory were not "clearly established" at the time of the supposed default in Mr. Valerio's case. The court's treatment of Lischko and Pertgen in Pellegrini is parallel to the California Supreme Court's acknowledgment that it had applied its procedural rules in its discretion in In re Clark, 5 Cal.4th 750, 855 P.2d 729, 737 (1993); and this Court in part based its conclusion that California's pre-Clark default rulings were not adequate to bar federal review on the admission in Clark. Morales v. Calderon, 85 F.3d 1387, 1391-1393 (9th Cir. 1996). The admitted lack of clarity in the Nevada Supreme Court's decisions, combined with the court's actual practice, compels this Court to conclude, as it did in Morales, that the application of Nevada default rules at the time of Mr. Valerio's case were not sufficiently clearly established or regularly followed to be adequate to bar federal

review.

B. The Pellegrini court's analysis of its previous dispositions does not and cannot show that the application of its default rules has been consistent.

The state contends, however, that the Nevada Supreme Court did apply its default rules consistently before Pellegrini, and the court in Pellegrini essentially makes the same argument in response to this Court's decisions in McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995) and Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001). See 34 P.3d at 533-536. The court's actual practice tells quite a different story, however, and it supports the conclusion that the state law as applied by the Nevada Supreme Court has been neither clear nor consistent.

1. The unpublished dispositions.

First, the court, like the state in this case, provides no analysis whatsoever of its unpublished dispositions, like Hardison, in which it disregarded default rules entirely. While the Pellegrini court states that it has applied default rules in published and unpublished cases, 34 P.3d at 526 n. 10, that is not the issue: the question is whether it has also disregarded default rules, either in its unfettered discretion or on grounds upon which it has not disregarded defaults in other cases; and Mr. Valerio's briefing shows unequivocally that it has done so, most clearly in successive collateral proceedings in capital cases. The Pellegrini decision thus supports appellant's

argument: if application of the default rules is mandatory, as the Pellegrini decision states, 34 P.3d at 536, then the constitutional claims in Hardison could not have been addressed without a finding of cause to excuse the defaults, and there is no such finding; the lone claim reviewed on the merits in Bejarano II could not have been reviewed without a finding of cause, and there is no such finding; and the claims reviewed in the other unpublished cases cited by appellant, see Second Supp. Br. of Petitioner-appellant at 9-12, could not have been reviewed without findings of cause, and there are no such findings.

2. The published cases.

The Pellegrini court's efforts to fit its previous published decisions into its mandatory-application-of-defaults scheme further reveal that rationally harmonizing the court's various practices simply is not possible. The Pellegrini court's discussion of the Hill and Bennett cases, 34 P.3d at 526 n. 10, 536, supports appellant's arguments.

a. The Hill cases

The Pellegrini court, responding to the criticism that it addressed the merits of constitutional claims in Hill without making a finding of cause, noted that a discussion of cause in the published Hill decision was not necessary because the approval to file the second petition was contained in the court's unpublished order

dismissing the appeal in the first collateral proceeding. 34 P.3d at 536. This position does not address the arguments made by appellant here.

First, the problem is not absence of a finding of cause in the published Hill decision, but the absence of any such finding in the unpublished order. The unpublished order contains no discussion of cause at all and authorizes the filing of a successive petition because of "the unique circumstances of this case," a standard so vague that it has no discernable content at all.[4] See also Neuschafer, Supp. JN Ex. 4 (giving anticipatory authorization for filing second petition where first petition failed to state claim, rather than barring subsequent petitions).

Second, the Pellegrini analysis ignores the other disregard of procedural default rules in Hill. The court in Hill entertained claims on the merits that had been raised for the first time on appeal from the denial of the second post-conviction petition. The Hill court justified that review on the ground that the claims presented

---

[4] Any case involving a death sentence has "unique" seriousness, and the court has cited "unique" circumstances in other cases without giving any hint as to what circumstances would meet that standard. See Bridges v. State, 117 Nev. ___, 6 P.3d 1000, 1010 (2000) (error could not have affected jury weighing of aggravating and mitigating factors under "unique circumstances" of case; only circumstance cited is lack of "compelling" mitigation); Chambers v. State, 113 Nev. 974, 985, 944 P.2d 805 (1997) (death penalty reduced as excessive for "vicious" crime due to "unique circumstances" of case, where defendant intoxicated and killing resulted from "emotionally charged confrontation" in which defendant "could have been reacting from anger" (emphasis supplied); see also Holloway v. State, 117 Nev. ___, 6 P.3d 987, 994 (2000) (court must review all death sentences carefully due to "unique" severity of penalty).

constitutional issues and the record was sufficiently developed to allow review. Hill v. State, 114 Nev. 169, 171, 953 P.2d 1077 (1998). As appellant previously showed, there is no discussion in Hill of the bar for failure to raise the claims earlier, see Nev. Rev. Stat. § 34.810(1)(b), in either the first or the second post-conviction petitions; and the court's action in Hill is thus plainly inconsistent with its position in Pellegrini that application of that bar is mandatory. While the Pellegrini court takes this Court to task for supposedly misreading the Pertgen decision, Pertgen v. State, 110 Nev. 554, 560, 875 P.2d 361 (1994), as allowing discretionary review of claims in collateral proceedings, the Supreme Court did exactly that in Hill: it reviewed claims raised for the first time on the appeal from the denial of collateral relief on the same ground that it reviewed claims raised for the first time on direct appeal in Pertgen.[5] In short, while the Pellegrini court may prescribe what the state law now is, no amount of legerdemain can fit its previous decisions into its current scheme.

---

[5] The Pellegrini decision is equally silent about the justification for the court's review of constitutional claims sua sponte on appeal from the denial of collateral review, in Bejarano I, 106 Nev. at 843, and about its review of a constitutional claim, that was subject to the same bars as the claims to which the court actually applied the default rules without any explanation for the disparity in treatment, in Bejarano II, 112 Nev. at 1471 n. 2. Similarly, the Pellegrini court attempts to harmonize the apparently inconsistent applications of default rules as a result of the changing procedure for raising claims of ineffective assistance of counsel, 34 P.3d at 532-535; but it does not attempt to explain the cases in which it has addressed claims other than those of ineffective assistance. See Second Supp. Br. of Petitioner-appellant at 9, 11-12.

b. The Bennett case

The Pellegrini court's treatment of Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995), also exposes the futility of trying to harmonize the court's actual practice with its ostensible rules. In Pellegrini, the court stated that it had excused an alleged timeliness default in Bennett because it "concluded that good cause excused the procedural bar at NRS 34.726(1) for untimely filing of a second petition where the first petition had been timely filed, but not pursued by counsel, and any delay in filing the second petition was not the petitioner's fault." Pellegrini, 34 P.3d at 526 n. 10. The language used in Bennett and Pellegrini, noting that any delay was "not the petitioner's fault," 34 P.3d at526 n. 10, refers to the language of the current one-year filing statute, Nev. Rev. Stat. § 34.726(1); but the Bennett proceeding was commenced in 1990, so § 34.726(1), which applies only to petitions filed after January 1, 1993, could not apply. During the period between 1987 and 1993, appointment of counsel in collateral proceedings was not mandatory even in capital cases, and the court has held that counsel's ineffectiveness cannot establish cause (regardless of the petitioner's lack of "fault") unless appointment of counsel is mandatory. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997); Bejarano II, 112 Nev. at 1470.

The Pellegrini decision, as it interprets Bennett, contradicts the Crump rule by

assuming that a finding of cause existed in Bennett through the court's refusal to "penalize" the petitioner for counsel's actions, even when counsel's derelictions took place in a pre-1993 proceeding. See also Stevens, JN Ex. 1-17; Second Supp. Br. of Petitioner-appellant at 16-17. The Pellegrini decision thus leaves the issue of what constitutes cause more confused than it was before: the Pellegrini court now appears to interpret counsel's error which did not involve the petitioner's "fault" as "cause" in a pre-1993 collateral proceeding which is not a theory it recognized in Bejarano II or in appellant's case. In light of Pellegrini's gloss on Bennett, no one can now say for certain whether an error by counsel in a pre-1993 collateral proceeding can constitute cause or not.

Similarly, the Bennett decision did not find cause to excuse the failure to raise claims in earlier proceedings: it found apparent merit to the state's invocation of a default on that ground, but it declined to address the procedural issues and stated that it would "choose" - - using clearly discretionary language - - to address the claims on the merits anyway. 111 Nev. at 1103. The Pellegrini court's emphasis on the supposedly mandatory character of the default rules, 34 P.3d at 536, makes no reference to this ability to "choose" to address claims without resolving procedural issues, any more than it addressed its sua sponte review of issues on collateral review in Bejarano I, 106 Nev. at 843. These decisions are antithetical to the existence of a

"clearly established" rule that imposition of procedural defaults ~~is~~ mandatory, and the Pellegrini decision offers no rational way to harmonize them.

C. Conclusion.

The Pellegrini court criticizes this Court's Petrocelli and McKenna decisions and purports to show that its administration of default rules has been consistent. While the Pellegrini decision may establish the state law "for its own purposes," Morales, 85 F.3d at 1392, it exposes the fact that its default rulings are not consistent: it does not address the unpublished decisions in which it disregards defaults;[6] and it cannot harmonize what the court has actually said in its previous decisions with its theory of mandatory imposition of defaults. Under these circumstances, this Court can conclude only that the Nevada Supreme Court applied its default rules in its standardless discretion at the time of Mr. Valerio's alleged default, as it has applied those rules inconsistently throughout their existence.

IV. CONCLUSION

For the reasons stated above and in the briefing previously submitted, this Court should hold that the default rulings imposed in Mr. Valerio's case are not

---

[6] It is ironic that the Pellegrini court held that imposition of default rules was mandatory within a month of the disposition in Wade, in which it sua sponte excused a default on a ground that it had previously refused to recognize. See Supp. JN Ex. 5; Second Supp. Br. of Petitioner-appellant at 14-15.

adequate to bar federal review it should therefore and reverse the judgment of the district court.

RESPECTFULLY SUBMITTED this 18th day of January, 2002.

FRANNY FORSMAN
Federal Public Defender

MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 388-6577

LAWRENCE D. WISHART
343 Flint Street
Reno, Nevada 89501
Telephone: (775) 348-2070

Attorneys for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately space 14-point. The total number of words is 4441.

FRANNY FORSMAN
Federal Public Defender

MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 388-6577

Attorneys for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Federal Public Defender and on this 18th day of January, 2002, I served a copy of the foregoing **SUPPLEMENTAL REPLY BRIEF OF PETITIONER-APPELLANT** by mailing a copy thereof to:

Robert E. Weiland
Senior Deputy Attorney General
1325 Airmotive Way, Suite 340
Reno, NV 89502

An employee of the Federal Public Defender